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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U.S.
FILED
MAR 2 1972
E. ROBERT SEAVER, CLERK

No. 71-492

LLOYD CORPORATION, LTD.,
Petitioner,

—VS.—

DONALD M. TANNER, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR CERTIORARI FILED OCTOBER 5, 1971
CERTIORARI GRANTED JANUARY 17, 1972

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DOCKET ENTRIES

DATE	PROCEEDINGS
1969	
Mar 7	Filed complaint
7	Issued summons
20	Filed copy summons with Marshal's return
28	Filed stipulation for extension of time (30 days); granted by Clerk (M. Hui, Dep)
Apr 28	Filed answer
June 16	Entered Order setting for pretrial calendar Aug. 18, 1969 S
18	Filed Deposition of Betsy Wheeler, taken June 3, 1969, Portland
Aug 18	Record of PTC
18	Entered Order resetting for pretrial calendar Sept. 15, 1969, under the rule. Parties to have completed pretrial order at this time S
Sept 2	Filed (2) Return on service of writ
Sept 3	Filed Depos of Donald M. Tanner
3	Filed Depos of Susan Roberts
15	Record of pretrial conference
15	Lodged Pretrial Order
15	Entered Order setting for trial week of November 10, 1969 S
Nov 12	Filed Deposition of Richard C. Horn
	Filed Deposition of Clifford P. Boss

DATE		PROCEEDINGS	
1969			
Nov	12	Filed Deposition of Francis M. Pulliam	
	13	Filed Deposition of Charles R. Ford	
	13	Filed and Entered Pretrial Order (11/12/69)	S
	13	Record of trial before the Court	
	13	Entered Order that pltfs' exhibits 1 thru 16 and 28 are received; Exhibits 17 thru 27 are received provisionally	S
	13	Entered Order that deft's exhibits 51 thru 56 and 60 are received; Exhibits 57 and 58 taken under advisement	S
	13	Record of offer of proof of deft re turning in draft cards at Centenary Wilbur Methodist Church	
	13	Entered Order rejecting offer of proof	S
	13	Case to be submitted on merits-briefs to come; pltfs' brief in; deft to and including Nov 27, 1969, to answer and pltfs to and including Dec 5, 1969, to reply	S
	13	Lodged pltf's trial brief	
	13	Lodged deft's trial brief	
	28	Lodged deft's Post Trial Brief	
1970			
Jan	15	FILED and Entered OPINION	S
	30	Filed and entered Declaratory Judgment and Decree signed Jan 27, 1970; pltfs have right to distribute non-commercial handbills in a peaceful and orderly manner, etc; enjoining defts, etc (m1/29/70)	S

DATE		PROCEEDINGS
1970		
Feb	3	Filed Cost Bill
	5	Costs taxed at $1[illegible]7.92 (LD 5 P 116)
		Filed notice of appeal by Lloyd Corporation, Ltd. Counsel notified.
		Filed Bond for costs on appeal.
	16	Filed reporter's transcript of proceedings of November 13, 1969
	26	Filed and entered order allowing defendant to remove all photographs for copying. S
Mar	20	Filed stipulation re corrections in transcript of proceedings dated November 13, 1969

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Civil No. 69-127

DONALD M. TANNER, BETSY WHEELER and SUSAN ROBERTS,
Plaintiffs,

vs.

LLOYD CORPORATION, LTD.,
Defendant.

CARL R. NEIL
c/o American Civil Liberties Union of Oregon, Inc.
Ninth Floor, Loyalty Building
Portland, Oregon 97204
226-1191
Attorney for Plaintiffs

COMPLAINT

Plaintiffs allege:

I.

Plaintiffs bring this suit to obtain declaratory and injunctive redress for defendant's deprivation, under color of state statute and municipal ordinance, of rights guaranteed to plaintiffs by the First and Fourteenth Amendments to the United States Constitution. This Court has jurisdiction under 28 USC Sec. 1343(3) and (4) and 42 USC Sec. 1983.

II.

Plaintiffs are citizens of the United States; defendant at all times material herein was and now is a California corporation duly qualified and licensed to do business in the State of Oregon.

III.

Defendant is the owner and operator of "Lloyd Center," a shopping center advertised by defendant as the world's largest, situated upon real property owned by defendant consisting of approximately 30 blocks of Holladay's Addition to East Portland, in the City of Portland, Oregon, lying between N.E. Broadway Street on the north and N.E. Multnomah Street on the south and between N.E. Ninth Avenue on the west and N.E. 15th Avenue on the east.

IV.

Within the area described in the foregoing paragraph, the Lloyd Center is presently traversed east and west only by N.E. Halsey and N.E. Weidler and is presently traversed north and south only by those portions of N.E. 10th Avenue and N.E. 14th Avenue lying between N.E. Broadway and N.E. Halsey. By Ordinance No. 101288 duly enacted on November 10, 1954, supplemented by Ordinance Nos. 107641 and 28669 duly enacted on March 20, 1958 and December 6, 1961, respectively, the City of Portland vacated and ceded title to defendant of the following public streets previously traversing the area now occupied by Lloyd Center:

N. E. Clackamas Street from N. E. 9th Avenue to N. E. 15th Avenue;

N. E. Wasco Street from N. E. 9th Avenue to N. E. 15th Avenue;

N. E. 10th, 11th, 12th, 13th and 14th Avenues from N. E. Multnomah Street to N. E. Halsey Street;

N. E. 12th Avenue from N. E. Halsey Street to N. E. Broadway Street.

The public street area so vacated and ceded to defendant consists of approximately 385,000 square feet, or 8.838

acres, of land which is now part of the real property upon Lloyd Center is situated.

V.

Space in buildings of Lloyd Center is leased from defendant and occupied by more than 60 commercial businesses and professional offices, and Lloyd Center includes more than 850,000 square feet of open and covered parking space affording off-street parking for more than 1,000 vehicles. Lessees from defendant and occupiers of space in Lloyd Center include Meier & Frank Company, a retail department store, doctors, dentists, lawyers, one or more bakeries, banks, barber shops, beauty salons, candy stores, carpet and rug dealers, cleaners, coin dealers, insurance agents, jewelers, small loan companies, opticians, pharmacies, portrait photographers, restaurants, shoe repair shops, travel agents, a skating rink, and one or more businesses engaged in sale of the following products and services: office machines and supplies, cosmetics, dancing supplies, donuts, fireplace equipment, furniture, gifts, health foods, hearing aids, high fidelity and stereophonic sound equipment, lamps and lampshades, women's apparel, men's clothing and furnishings, musical instruments, neck-wear, nuts, party supplies, phonograph records, photographic equipment and supplies, picture frames, shoes, sporting goods, toys, typewriters and wines.

VI.

Businesses and professional offices in the two levels of Lloyd Center are reached by and open off of malls and walkways radiating from a central mall to parking areas and to streets; all such malls, walkways and parking areas within Lloyd Center are intended by defendant to be open to the general public.

VII.

At all times since Lloyd Center was constructed, defendant has had and now has in effect a rule and policy forbidding distribution of non-commercial literature to the public in any mall, walkway, parking area or other portion of Lloyd Center intended by defendant for use of the general public, and has enforced said rule and policy by ordering persons violating it to cease distribution of the literature and leave the Lloyd Center and by treating violation of such orders as criminal trespass punishable under a statute of the State of Oregon, ORS 164.460, and an ordinance of the City of Portland, Sec. 16-613 of the Police Code. A true copy of said ordinance is attached hereto as Exhibit A.

VIII.

On November 14, 1968, four persons, including plaintiffs, distributed to passersby at various points along the malls and walkways of Lloyd Center intended by defendant to be open to the general public, copies of an anti-war leaflet which announced a meeting that evening at a church. A true copy of said leaflet is attached hereto as Exhibit B. Plaintiffs' distribution of the leaflet was at all times peaceful and orderly, created no disturbance, and did not interfere with public use of the malls and walkways of Lloyd Center or with access to or egress from any business or professional office in Lloyd Center.

IX.

Uniformed guards employed by defendant ordered plaintiffs to cease distribution of the leaflet anywhere in Lloyd Center. When plaintiffs continued such distribution, they were taken by the guards to defendant's manager and chief of guards, who advised plaintiffs of the above-mentioned rule and policy of defendant, or-

dered plaintiffs to cease distribution of the leaflet anywhere in Lloyd Center and to leave Lloyd Center, and told plaintiffs that if they did not cease distribution of the leaflet and leave Lloyd Center, defendant would cause plaintiffs to be arrested and prosecuted for criminal trespass.

X.

In threatening plaintiffs with arrest and prosecution for criminal trespass, defendant was threatening to invoke against plaintiffs ORS 164.460 and/or Sec. 16-613 of the Police Code of the City of Portland, and defendant would have caused plaintiffs to be arrested, prosecuted and convicted for violation of said statute or ordinance if plaintiffs had not complied with defendant's orders to cease distribution of the leaflet and leave the Lloyd Center. To avoid such arrest and conviction, plaintiffs obeyed the orders of defendant and ceased distribution of the leaflet and left Lloyd Center.

XI.

By reason of the premises aforesaid, defendant acting under color of its aforesaid rule and policy, enforced by statute of the State of Oregon and ordinance of the City of Portland, has deprived plaintiffs of their rights guaranteed by the First and Fourteenth Amendments to the United States Constitution to free speech, freedom of the press and peaceable assembly.

WHEREFORE, plaintiffs pray for redress by a decree:

1. Declaring and adjudging that defendant's policy and rule, as applied to forbid peaceful and orderly distribution of non-commercial literature to the public in the malls, walkways and other areas of Lloyd Center open to the general public and outside areas occupied

for business or professional use, is void and invalid under the First and Fourteenth Amendments to the United States Constitution;

2. Declaring and adjudging that defendant's conduct in enforcing its policy and rule against plaintiffs, as set forth in the complaint, was and is a violation of 42 USC Sec. 1983;

3. Permanently enjoining defendant, its agents, employees and all persons in concert with them, from interfering with peaceful and orderly distribution by plaintiffs or others similarly situated of non-commercial literature to the public in malls, walkways and other areas of the Lloyd Center open to the general public and outside areas occupied for business or professional use;

4. Awarding plaintiffs such other relief as the Court finds just and proper;

5. Awarding to plaintiffs their costs and disbursements incurred herein.

/s/ Carl R. Neil
CARL R. NEIL
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 69-127

DONALD M. TANNER, BETSY WHEELER
and SUSAN ROBERTS,
Plaintiffs,

vs.

LLOYD CORPORATION, LTD.,
Defendant.

GEORGE BLACK, JR.
MILTON C. LANKTON
ROBERT J. MILLER
BLACK, KENDALL, TREMAINE,
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1200 Cascade Building
Portland, Oregon 97204
226-3245
Attorneys for Defendant

ANSWER

FIRST DEFENSE

The Court lacks jurisdiction of the subject matter alleged in the Complaint.

SECOND DEFENSE

The Court lacks jurisdiction of the person of the plaintiffs and of the defendant.

THIRD DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

FOURTH DEFENSE

The Court should refuse to exercise its equity power in connection with the alleged threatened enforcement of state law because no Court of the State of Oregon has determined the questions concerning the plaintiffs' criminal liability that are raised by the matters alleged in the Complaint.

FIFTH DEFENSE

I

The defendant admits that it is a California corporation duly qualified and licensed to do business in the State of Oregon and that it owns and operates Lloyd Center.

II

The defendant is without knowledge or information sufficient to form a belief as to whether or not the plaintiffs are citizens of the United States.

III

The defendant admits that parts of the Lloyd Center are located between N. E. Broadway and N. E. Multnomah Streets on the north and south, and between N. E. 15th and N. E. 9th Avenues on the east and west in Holladay's Addition to East Portland.

IV

The defendant admits that Lloyd Center is traversed by N. E. Halsey, N. E. Weidler, N. E. 10th and N. E. 14th Avenues; that portions of N. E. Clackamas and Wasco Streets and portions of N. E. 10th, 11th, 12th, 13th and 14th Avenues were vacated and that in exchange therefor the defendant conveyed land of equal

area to the City of Portland; and that the land so vacated is now part of the property upon which Lloyd Center is situated.

V

The defendant admits that space in Lloyd Center is leased to more than sixty businesses and professional offices; that Lloyd Center includes more than 850,000 square feet of open and covered parking space; and that lessees in the Lloyd Center include various mercantile, professional and service establishments which deal in a variety of products and services.

VI

The defendant admits that persons whose identities are unknown to the defendant sought to distribute anti-war leaflets on defendant's private property at Lloyd Center on or about November 14, 1968; and the defendant alleges that it is without knowledge or information sufficient to form a belief as to whether such persons were the plaintiffs.

VII

Except as so admitted, the defendant denies the allegations of the plaintiffs' Complaint.

SIXTH DEFENSE

The relief prayed for in the plaintiffs' Complaint, if granted, would deprive the defendant of its property and property rights without due process of law in violation of the Constitution of the United States of America.

SEVENTH DEFENSE

The distribution of handbills by the plaintiffs on and from the defendant's private property bore no relation, directly or indirectly, to the defendant or any of its

tenants or properties or any of the businesses or activities conducted in or on said Lloyd Center; said distribution was not consonant with the use to which said private property was actually put and was attempted without the defendant's permission and against its wishes.

EIGHTH DEFENSE

Plaintiffs' ability to communicate their desired information and ideas in full accordance with their constitutional rights would have been, and could be, accomplished by distribution of said handbills on and from property, other than the defendant's private property, in the immediate vicinity and elsewhere.

NINTH DEFENSE

That plaintiff and the particular handbills which they sought to distribute on and from defendant's private property at the time and place complained of in the Complaint, advocated, aided, counselled and abetted the evasion and noncompliance with the Selective Service laws and the Internal Revenue laws of the United States of America; that defendant should not be required to permit the use of its private property for any such purpose.

TENTH DEFENSE

The handbills sought to be distributed by plaintiffs on defendant's property were of a character offensive to many persons and likely to lead to retaliatory action and disturbance to the detriment of the peace and quietude of the premises of defendant and its tenants and the interests of their patrons.

ELEVENTH DEFENSE

In this case, plaintiffs do not come into this Court with clean hands.

The defendant prays for a judgment dismissing the plaintiffs' Complaint and awarding to the defendant its costs and disbursements incurred herein.

BLACK, KENDALL, TREMAINE,
BOOTHE & HIGGINS

/s/ George Black, Jr.
GEORGE BLACK, JR.
Attorneys for the Defendant

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Civil No. 69-127

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PRETRIAL ORDER

As a result of a pretrial conference heretofore held at which plaintiffs were represented by Carl R. Neil, their attorney, and defendant was represented by Robert J. Miller, of its attorneys, the following pretrial order was framed.

I.

NATURE OF PROCEEDINGS

This is a suit for a declaratory judgment and an injunction under the Civil Rights Act, 42 USC Sec. 1983, in which it is alleged that the defendant, acting under alleged color of state statute and municipal ordinance, deprived the plaintiffs of rights claimed by the plaintiffs to be guaranteed to them by the First and Fourteenth Amendments to the United States Constitution, which allegations and claims are denied by the defendant.

II.

JURISDICTION

The plaintiffs contend that this Court has jurisdiction irrespective of diversity of citizenship or amount in controversy under 42 USC Sec. 1983, and 28 USC Sec. 1343 (3). The defendant denies that this Court has jurisdiction of the claim made by the plaintiffs.

III.

AGREED FACTS

The following facts have been agreed upon by the parties and require no proof:

1. The plaintiffs are citizens of the United States. The defendant Lloyd Corporation, Ltd., is a California corporation duly qualified and licensed to do business in the State of Oregon and is the owner and operator of the Lloyd Center shopping center that is situated in Holladay's Addition to East Portland in the City of Portland, Oregon.

2. On November 14, 1968, a number of persons, including the plaintiffs, distributed to passersby at various points along the malls and walkways of the privately

owned property of the defendant in Lloyd Center, certain anti-war leaflets, copies of which are Exhibits 1 and 2. Such distribution of literature occurred without permission of the defendant. Security Officers employed by the defendant told the plaintiffs and the others so distributing said leaflets to cease such distribution on and from the privately owned property of the defendant in Lloyd Center, and that if they desired to make further distribution, to make such distribution from the public streets and sidewalks in the Center. Employees of the defendant advised the plaintiffs that if they did not cease distribution from the privately owned portions of Lloyd Center, they could be subject to arrest. Such distribution was then continued by the plaintiffs and others from the public streets and sidewalks in Lloyd Center. No arrests were made and no warrant for arrest was requested or applied for by the defendant.

3. Lloyd Center is a retail shopping center with off-street parking facilities. It lies between N. E. Broadway Street on the north and N. E. Lloyd Boulevard on the south and between N. E. 9th Avenue on the west and N. E. 16th Avenue on the east. It is traversed east and west by N. E. Weidler, N. E. Halsey, N. E. Multnomah and N. E. Holladay Streets and north and south by N. E. 15th Avenue. It is also bordered by N. E. 10th Avenue, N. E. 11th Avenue, N. E. 13th Avenue and N. E. 14th Avenue and partially traversed by N. E. Wasco and N. E. Clackamas Streets, all of which said streets and avenues are public streets of the City of Portland, Oregon. The defendant's properties in Lloyd Center are shown on a map which is Exhibit 3 and the area is depicted on the aerial photographs which are Exhibits 4 and 5. The defendant is the owner of fee title to all of the land upon which such Lloyd Center shopping center facilities are situated.

4. Within Lloyd Center, defendant owns and maintains covered and open parking areas, malls and walk-

ways on the mall level and walkways and stairways leading from and to different levels, to interior and exterior parking areas and to public streets and sidewalks; a skating rink that is open to patrons who pay a fee for admission; elevators, escalators, stairways and bridges to facilitate movement of pedestrial traffic; gardens, flower plantings, statuary, murals and various works of art and architecture within the Center, and benches, directories, information booths and other facilities therein for the convenience of shoppers.

5. Lloyd Center includes more than 850,000 square feet of open and covered parking space affording off-street parking for more than 1,000 vehicles. Space in buildings of Lloyd Center is leased from the defendant and occupied by more than 60 commercial businesses and professional offices which deal in a variety of products and services.

6. Some business and professional offices in Lloyd Center can be reached only through one or more of the interior malls and walkways, while other businesses and professional offices in Lloyd Center can be entered either from exterior sidewalks or from one or more interior malls and walkways.

7. The parking lots maintained by the defendant in Lloyd Center are accessible by driveways from public streets. All public streets bordering Lloyd Center are abutted by public sidewalks. All driveways leading to and from parking areas owned by the defendant cross such public sidewalks and vehicles exiting the parking lots owned by the defendant and entering the public streets are required by law to stop before entering such public streets.

8. Lloyd Center is accessible by public bus transportation. Persons arriving by bus alight from buses onto

the publicly owned sidewalks abutting the defendant's property. Pedestrians entering the Lloyd Center shopping areas from outside Lloyd Center must cross public sidewalks.

9. Employees of the defendant have requested persons to cease distribution of literature from defendant's privately owned property in Lloyd Center and have asked such persons to go to public sidewalks to make such distribution.

10. The defendant employs a staff of armed Security Officers who wear uniforms similar, but not identical, in appearance to those of Portland City Police Officers. All such Security Officers employed by the defendant hold commissions from the City of Portland as special police officers of the City of Portland which invest them with "full police authority." Exhibit 6 is a copy of the standard form letter by which the defendant applies on behalf of its Security Officers for such commissions. Exhibit 7 is a copy of the commission of Clifford Boss, Chief of the defendant's Security Officers.

11. On February 7, 1962 and on December 8, 1964, the defendant issued instructions to the Lloyd Center Security Officers concerning the handling of offenses at Lloyd Center. Such instructions are Exhibits 8 and 9.

12. At all times material in this case, there was in full force and effect an ordinance of the City of Portland codified as Section 16-613 of the Police Code. Exhibit 10 is a true copy of that ordinance.

IV.

PLAINTIFFS' CONTENTIONS

Plaintiffs contend and defendant denies as follows:

1. The main portion of Lloyd Center consists of a single interconnected structure of several levels situated

on what were formerly 18 city blocks, and is bounded by N. E. Halsey on the north, N. E. 9th Avenue on the west, N. E. Multnomah Street on the south and N. E. 15th Avenue on the east. This portion of Lloyd Center is hereinafter referred to in Plaintiffs' Contentions as the "main part of Lloyd Center."

2. By Ordinance No. 101288 duly enacted November 10, 1954, supplemented by Ordinance Nos. 107641 and 28669 duly enacted on March 20, 1958 and December 6, 1961, respectively, the City of Portland vacated and ceded title to defendant of the following public streets previously traversing the area now occupied by Lloyd Center:

N. E. Clackamas Street, from N. E. 9th Avenue to N. E. 15th Avenue;

N. E. Wasco Street from N. E. 9th Avenue to N. E. 15th Avenue;

N. E. 10th, 11th, 12th, 13th and 14th Avenues from N. E. Multnomah Street, to N. E. Halsey Street;

N. E. 12th Avenue from N. E. Halsey Street to N. E. Broadway Street.

The public street area so vacated and ceded to defendant consists of approximately 385,000 square feet, or 8.838 acres of land which is now part of the real property upon which Lloyd Center is situated. Prior to this vacation and cession to defendant, the portions of the streets above mentioned were open public streets.

3. The great majority of businesses and professional offices leasing space from defendant in Lloyd Center are situated in the main part of Lloyd Center, and the greatest vehicular and pedestrian use of Lloyd Center occurs there.

4. The parking areas, malls and walkways within Lloyd Center are the functional equivalents of public streets and sidewalks.

5. Defendant has kept the interior malls and walkways of Lloyd Center open to the general public at all times, and has not restricted their use solely to shoppers or persons transacting business with defendant or its tenants. While defendant has required its permission for use of malls and walkways of Lloyd Center for purposes other than general pedestrian movement, defendant has invited and permitted without charge political rallies for presidential candidates in the central mall of the main part of Lloyd Center, and has allowed political and other groups to use the auditorium in the lower level of the main part of Lloyd Center. Defendant has also permitted without charge the following uses by private, non-commercial organizations of space in the malls and walkways of Lloyd Center:

a. Solicitation of funds during the Christmas season by bell ringers of the Salvation Army and Volunteers of America;

b. Sale of "Buddy Poppies" by the American Legion;

c. Displays by the Boy Scouts of America;

d. Concerts by college and high school musical groups and other entertainment.

Lloyd Center maintains a public information booth in the central mall of the main part of Lloyd Center. Among other things sold or distributed to the public at this booth have been Rose Festival pins, and pamphlets on the Portland Zoo and on the Sanctuary of Our Sorrowful Mother, a religious shrine also known as The Grotto. Defendant has also invited outside groups to hold Vet-

erans Day ceremonies and football rallies in the central mall of the main part of Lloyd Center.

6. Plaintiffs' distribution of literature (P. Exs. 1 and 2) on malls and walkways of Lloyd Center on November 14, 1968 was consonant with other uses of those areas of Lloyd Center permitted by defendant.

7. At all times material in this case, defendant has had and now has in effect a rule and policy forbidding distribution of literature of any type to the public in any mall, walkway, parking area or other portion of Lloyd Center intended by defendant for use of the general public. Employees of defendant have on many occasions instructed persons to cease distribution of literature in these and all other areas within Lloyd Center.

8. The distribution of leaflets (P. Exs. 1 and 2) by plaintiffs and others within Lloyd Center on November 14, 1968 was at all times peaceful and orderly, created no disturbance, and did not unreasonably restrict public use of the malls and walkways of Lloyd Center or access to or egress from any business or professional office in Lloyd Center.

9. Instructions issued by defendant to its security guards on February 7, 1962 and December 8, 1964 (P. Exs. 8 and 9) were in effect as to handling of persons distributing literature within Lloyd Center on November 14, 1968.

10. In ordering plaintiffs and others to cease distribution of the leaflets within Lloyd Center (see Agreed Facts, para. 2), defendant's security guards stated or implied to plaintiffs and others that they would be arrested if they continued to distribute the leaflets within Lloyd Center, and were acting in accordance with defendant's standing instructions (P. Exs. 8 and 9) and its policy against distribution of any literature within Lloyd Center without its permission.

11. By its instructions to its security guards (P. Exs. 8 and 9) and by the stated or implied threat of defendant's security guards, who are special police officers of the City of Portland and have full police authority of the City of Portland within Lloyd Center, to cause the arrest of plaintiffs and others distributing leaflets within the malls and walkways of Lloyd Center on November 14, 1968 if they disobeyed orders of the security guards to desist, defendant acted under color of the criminal trespass statute of the State of Oregon (ORS 164.460) and/or the criminal trespass ordinance of the City of Portland (P. Ex. 10) to enforce its policy against distribution of any literature within the malls and walkways of Lloyd Center or elsewhere within Lloyd Center.

12. Plaintiffs and others distributing leaflets on November 14, 1968 ceased distribution within Lloyd Center in order to avoid arrest and prosecution under the criminal trespass statute or ordinance as threatened by defendant's security guards.

13. Restriction of distribution of literature to exterior public sidewalks adjacent to Lloyd Center prevents distribution to a large number of persons who arrive by automobile and park within Lloyd Center and therefore do not walk upon the exterior sidewalks adjacent to Lloyd Center.

14. Plaintiffs' distribution of the leaflets (P. Exs. 1 and 2) on November 14, 1968 would have been the exercise of rights of free communication protected by the First and Fourteenth Amendments to the United States Constitution against infringement by outright prohibition or other unreasonable regulation, if such distribution had occurred on public sidewalks.

15. Whether or not consonant with other uses of those areas permitted by defendant, plaintiffs' distribution of the leaflets on November 14, 1968 on malls and walkways of the main part of Lloyd Center, as well as upon exterior public sidewalks adjacent to Lloyd Center, was also

within the protection of the First and Fourteenth Amendments to the United States Constitution against infringement by outright prohibition or other unreasonable regulation.

16. In prohibiting plaintiffs from orderly and peaceful distribution of non-commercial leaflets on malls and walkways of Lloyd Center and threatening to cause plaintiffs to be arrested if they continued such distribution there or elsewhere within Lloyd Center, defendant, under color of state statute and/or municipal ordinance, deprived plaintiffs of rights guaranteed by the First and Fourteenth Amendments to the United States Constitution to free speech, freedom of the press and peaceable assembly, in violation of 42 USC Sec. 1983.

17. Plaintiffs are entitled to redress by a decree:

a. Declaring and adjudging that defendant's policy and rule, as applied to forbid peaceful and orderly distribution of non-commercial literature to the public in the malls, walkways and other areas of Lloyd Center, open to the general public and outside areas occupied for business or professional use, is void and invalid under the First and Fourteenth Amendments to the United States Constitution;

b. Declaring and adjudging that defendant's conduct in enforcing its policy and rule against plaintiffs, under the circumstances of this case, was and is a violation of 42 USC Sec. 1983;

c. Permanently enjoining defendant, its agents, employees and all persons acting in concert with them, from interfering with peaceful and orderly distribution by plaintiffs or others similarly situated of noncommercial literature to the public in malls, walkways and other areas of the Lloyd Center open to the general public and outside areas occupied for business or professional use.

18. Plaintiffs deny the contentions of defendant.

V.

DEFENDANT'S CONTENTIONS

The defendant contends as follows:

1. The defendant's rights, existing under the laws of the State of Oregon and guaranteed by the Fifth Amendment to the Constitution of the United States, include the right to possession of its private property in Lloyd Center and the right to determine the uses to which such property shall be put.

2. The defendant uses its property in Lloyd Center exclusively as a shopping center for the business purpose of obtaining rental income and not for the purpose of providing a forum to anyone for the dissemination of matter, information or ideas not related to said purpose.

3. The defendant has not opened, dedicated or otherwise devoted its private property in Lloyd Center to public use. It has retained all rights, powers and privileges of a private property owner with respect to such property. The defendant has so informed its patrons and the public and all persons coming upon its private property in Lloyd Center by maintaining at all entrances thereto signs that state:

> "NOTICE—Areas In Lloyd Center Used By The Public Are Not Public Ways But Are For The Use Of Lloyd Center Tenants And The Public Transacting Business With Them. Permission To Use Said Areas May Be Revoked At Any Time. Lloyd Corporation, Ltd."

4. In furtherance of the said business use of its private property, the defendant and its tenants have invested substantial sums of money to create and maintain attractive and convenient facilities, and to bring events and other things of interest to Lloyd Center, and for

publicity and public relations and advertising and other matters, all for the purpose of attracting shoppers, retail customers and patrons to Lloyd Center and to motivate such persons to make retail purchases from the defendant's tenants.

5. The plaintiffs, in seeking to make free use of the defendant's private property as a forum for distribution of anti-war leaflets, are attempting for their own purposes to take advantage of conditions that have been created solely for the aforesaid business purposes by the defendant and its tenants at great expense.

6. The defendant, in furtherance of the business use of its private property, is legally and equitably privileged to prevent and exclude from its property in Lloyd Center all things, conduct and acts that in any way tend to distract persons or shoppers from making retail purchases or that in any way are offensive to retail customers or potential retail customers and it has endeavored at all material times so to do.

7. The defendant has retained, and has, the legal right to exclude from its private property in Lloyd Center persons who use or attempt or intend to use such property as a forum for the publication or dissemination of ideas and information which such ideas and information are not related to or consonant with the use to which the defendant has actually put its private property.

8. The distribution of handbills by the plaintiffs on and from the defendant's private property in Lloyd Center bore no relation, directly or indirectly, to the defendant or any of its tenants or properties or to any of the businesses or activities conducted upon such property. Said distribution was not consonant with the use to which said private property was actually put.

9. The distribution of leaflets sought to be made by the plaintiffs would, if permitted, interfere with and be harmful to the business of the defendant and its tenants and would interfere with the use to which the defendant has put its property.

10. There is no constitutional provision or interpretation, and there is no law, that requires an owner of private property used for business purposes as a shopping center to permit distribution of leaflets that are not related to the owner of its tenants or properties or otherwise not consonant with the uses to which such private property has actually been put.

11. The statements made by the plaintiffs and the anti-war leaflets sought to be distributed by them upon the defendant's private property were not related to any activity, establishment or other matter related to the Lloyd Center or any part thereof, but were exclusively in regard to matters not related thereto.

12. The plaintiffs' ability to communicate their desired information and ideas in full accordance with their constitutional rights would have been and could be accomplished by distribution of said leaflets on and from property, other than the defendant's private property, in the immediate vicinity and elsewhere, including distribution to persons within Lloyd Center and persons entering and leaving Lloyd Center, from public streets and sidewalks and other public property within and adjacent to Lloyd Center. In the circumstances existing in this case, there is no justification for infringement of the defendant's constitutionally protected rights as the owner of this private property.

13. There is no constitutional provision or interpretation, and there is no law, that requires an owner of private property used for business purposes as a shop-

ping center to permit distribution of leaflets on such property when such distribution can be effectively accomplished elsewhere.

14. A court order requiring the defendant to permit the distribution sought to be made by the plaintiffs would constitute a taking of the defendant's property and property rights without just compensation and without due process of law.

15. The statements and leaflet distribution sought to be made by the plaintiffs are of a controversial nature offensive to many persons and likely to incite retaliatory action and disturbance to the detriment of the peace and quietude of the defendant's private property and its tenants and the interests of their patrons and retail customers and to the defendant's loss and damage.

16. The defendant and its employees and agents have a right, protected by the First Amendment to the United States Constitution, to request the plaintiffs and others seeking to distribute handbills, to leave the defendant's private property and to inform such persons that if they do not leave they will be trespassers and subject to arrest.

17. At the times and places complained of in the complaint, there was no arrest, or warrant for the arrest of any of the plaintiffs and there was no action under color of any statute or custom of a state and the court lacks jurisdiction of the subject matter alleged in the complaint.

18. No court of the State of Oregon has determined the questions raised by the matters alleged in the complaint concerning the plaintiffs' criminal liability as trespassers and the court should abstain from enjoining the alleged threatened enforcement of state law.

19. The United States Supreme Court has established a doctrine requiring the abstention of federal courts from

enjoining threatened enforcement of state law when no state court has theretofore ruled upon the questions of the scope or applicability of such state law or upon the constitutional questions applicable thereto.

20. This court has no jurisdiction or power to enjoin a threatened enforcement of state statute by state officials unless this application by the plaintiffs is heard and determined by a district court of three judges.

21. This court should not lend its aid to the plaintiffs in their aiding, counseling, advocating and abetting the violation of the Selective Service and Internal Revenue laws of the United States as shown by the handbills that the plaintiffs sought to distribute and should not compel the defendant to make its private property available for any such purpose.

22. The complaint fails to state a claim upon which relief can be granted.

23. The defendant denies the plaintiffs' contentions and each thereof and also denies the materiality and relevancy thereof.

24. A decree of this court should be entered dismissing this case for want of jurisdiction and if the court should determine that it has jurisdiction, denying the relief requested by the plaintiffs and each and every part thereof and declaring and adjudicating that the defendant is privileged to prohibit any and all handbilling, speeches or similar activity upon its private property or any part thereof that bears no relation to the shopping center purpose for which said Lloyd Center is used and maintained by the defendant or that is not otherwise consonant with that purpose.

VI.

ISSUES

1. Does the court have jurisdiction of the subject matter of this case?

2. Does the Complaint state a claim upon which relief can be granted?

3. May the court, under the circumstances of this case, abstain from granting an injunction until such time as a court of the State of Oregon has determined the questions concerning the plaintiffs' criminal liability as trespassers; if so, should the court do so?

4. Does the court have jurisdiction or power to grant an injunction under the circumstances of this case without the application therefor being heard by a district court of three judges?

5. Has the defendant deprived the plaintiffs of constitutional rights?

6. If the defendant has deprived the plaintiffs of any constitutional right, has it done so under color of law within the purview of 42 USC § 1983?

7. Would the granting of the relief requested by plaintiffs be a taking of the defendant's property or property rights without due process of law or just compensation?

8. If the court grants declaratory and/or injunctive relief, what should be the scope and effect thereof?

VII.

The identity and authenticity of the following exhibits are admitted by the parties, but other objections to admissibility are reserved.

PLAINTIFFS' EXHIBITS

1.	Leaflet distributed by plaintiffs at Lloyd Center on November 14, 1968
2.	Leaflet distributed by plaintiffs at Lloyd Center on November 14, 1968
3.	Map of Lloyd Center
3-A.	Map of City of Portland
4.	Aerial photograph of area including Lloyd Center
5.	Aerial photograph of area including Lloyd Center
6.	Copy of defendant's form letter requesting special police Commission for Lloyd Center security guards
7.	Copy of Commission of Captain Clifford Boss as special police officer of the City of Portland
8.	Defendant's memorandum to Lloyd Center security guards dated February 7, 1962
9.	Defendant's memorandum to Lloyd Center security guards dated December 8, 1964
10.	Ordinance of the City of Portland, Section 16-613 of the Police Code
11-A. through 11-V.	22 photographs of exterior and interior malls of "main" part of Lloyd Center, taken for plaintiffs in October and November, 1969
12.	Memorandum of Captain Clifford Boss to Mr. Horn dated November 14, 1968
13.	Deposition of Richard Horn
14.	Deposition of Captain Clifford Boss

15. Deposition of Francis M. Pulliam
16. Deposition of Charles R. Ford
17. Letter of Lloyd Center dated August 24, 1960
18. Letter of Lloyd Center dated November 21, 1967
19. Letter of Lloyd Center dated August 29, 1960
20. Letter of Lloyd Center dated September 15, 1964
21. Letter of Lloyd Center dated January 2, 1964
22. Letter of Lloyd Center dated September 24, 1964
23. Letter of Lloyd Center dated August 15, 1962
24. City of Portland ordinance Nos. 101288 (November 10, 1954), 106640 (September 18, 1957), 107641 (March 20, 1958) and 28669 (December 6, 1961) relating to vacation of public streets within what is now Lloyd Center
25. Letter of Lloyd Corp. to Mayor and Council of Portland dated September 10, 1954
26. Report of Portland city engineer dated July 28, 1954
27. Diagram of public streets vacated by ordinances of the City of Portland listed as Exhibit 24
28. Ordinance of the City of Portland, Administrative Code Section 3-407

DEFENDANT'S EXHIBITS

51. Deposition of Donald M. Tanner
52. Deposition of Betsy Wheeler
53. Deposition of Susan Roberts

54. Written statement of Donald M. Tanner dated November 26, 1968

55. 22 photographs of Lloyd Center

56. Lloyd Center lease form provision applicable to common area, operation and right-of-way

57. Resistance notes dated April 15, 1969

58. Undated letter to Robert from Betsy received in about June, 1969

59. Resolution adopted by Lloyd Center Merchants Association dated February 11, 1969

VII.

ORDER

The foregoing constitutes the pretrial order and shall not be amended except upon consent of the parties or upon order of the court to prevent manifest injustice.

DATED this 13th day of November, 1969.

/s/ Gus J. Solomon
United States District Judge

/s/ Carl R. Neil
CARL R. NEIL
Attorney for Plaintiffs

/s/ Robert J. Miller
ROBERT J. MILLER
Of Attorneys for Defendant

TRANSCRIPT OF RECORD

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

IN TWO VOLUMES

No. ———

LLOYD CORPORATION, LTD.,
Petitioner,

vs.

DONALD M. TANNER, BETSY WHEELER
and SUSAN ROBERTS,
Respondents.

VOLUME TWO

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Civil No. 69-127

DONALD M. TANNER, BETSY WHEELER and SUSAN ROBERTS,
Plaintiffs,

vs.

LLOYD CORPORATION, LTD.,
Defendant.

November 13, 1969
Portland, Oregon

TRANSCRIPT OF PROCEEDINGS

BEFORE:

The Honorable Gus J. Solomon, Chief Judge.

APPEARANCES:

Mr. Carl R. Neil, of Attorneys for Plaintiffs;
Messrs. Robert Miller and George Black, of Attorneys for Defendant.

[2] THE COURT: Go ahead, Mr. Neil.

MR. NEIL: The plaintiffs are ready, your Honor. I would like to advise the Court one of the plaintiffs, Miss Wheeler cannot be here until 4:00 when she gets off work because she has been instructed she would not have her job any longer if she left before 4:00 p.m. Other than that, we are ready to proceed.

Does your Honor want to hear opening statements? I am prepared to waive.

THE COURT: As I told Mr. Miller, instead of listening to all these witnesses about which there may or may not be any dispute, you can tell me what the witnesses are going to testify to. I will then ask Mr. Miller if that is true. If it is true, then we would go to the next witness.

MR. NEIL: All right, your Honor. Do you want me to start that way, your Honor?

THE COURT: Yes.

MR. NEIL: May I offer some evidence before I do so?

THE COURT: Yes.

MR. NEIL: We will offer Plaintiffs' Exhibits 14 through 16, which are the depositions of Mr. Boss, a security guard, Francis Pulliam and Mr. Ford. We are agreeable to their testimony going in by deposition rather than by oral testimony.

THE COURT: Any objection?

MR. MILLER: No objection.

[3] THE COURT: They are admitted.

MR. NEIL: We also offer all of Plaintiffs' Exhibits 1 through 12 and 17 through 28.

THE COURT: Any objection?

MR. MILLER: We do have objections, your Honor. We have no objection to 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 —excuse me, we have no objection to 12. We have no objection to 11-A through 11-V. We have no objection to 28.

We do have objection, your Honor, to Exhibits 17, 18, 19, 20, 21; 22, 23, 24, 25, 26 and 27, upon the ground they are irrelevant to any material issue in the case and that they are immaterial.

THE COURT: You admit to their authenticity?

MR. MILLER: Yes, we do.

THE COURT: I will admit those provisionally.

(Whereupon Plaintiffs' Exhibits 1, Leaflet distributed by Plaintiffs at Lloyd Center on November 14, 1968;

2, Leaflet distributed by Plaintiffs at Lloyd Center on November 14, 1968; 3, Map of Lloyd Center; 3-A, Map of City of Portland; 4, Aerial photograph of area including Lloyd Center; 5, Aerial [4] photograph of area including Lloyd Center; 6, Copy of Defendant's form letter requesting special police commission for Lloyd Center security guards; 7, copy of Commission of Captain Clifford Boss as special police officer of the City of Portland; 8, Defendant's memorandum to Lloyd Center security guards dated February 7, 1962; 9, Defendant's Memorandum to Lloyd Center security guards dated December 8, 1964; 10, Ordinance of the City of Portland, Section 16-613 of the Police Code; 11-A through 11-V, 22 photographs of exterior and interior malls of "Main" part of Lloyd Center; 12, Memorandum of Captain Clifford Boss to Mr. Horn dated November 14, 1968; 13, Deposition of Richard Horn; 14, Deposition of Captain Clifford Boss; 15, Deposition of Francis M. Pulliam; 16, Deposition of Charles R. Ford were received in evidence. [5] Plaintiff's Exhibit 17, Letter of Lloyd Center dated August 24, 1960; 18, Letter of Lloyd Center dated November 21, 1967; 19, Letter of Lloyd Center dated August 29, 1960; 20, Letter of Lloyd Center dated September 15, 1964; and 21, Letter of Lloyd Center dated January 2, 1964; 22, Letter of Lloyd Center dated September 24, 1964; 23, Letter of Lloyd Center dated August 15, 1962; 24, Letter of City Ordinance Nos. 101288 (November 10, 1954), 106640 (September 18, 1957), 107641 (March 10, 1958) and 28669 (December 6, 1961) relating to vacation of public streets within what is now Lloyd Center; 25, Letter of Lloyd Corporation to Mayor and Council of Portland dated September 10, 1954; 26, Report of Portland City Engineer dated July 28, 1954; 27, Dia-

gram of public streets vacated by ordinance of the City of Portland listed as Exhibit 24 and 28; [6] Ordinance of the City of Portland, Administrative Code Section 3-407 were received in evidence provisionally.)

MR. NEIL: Your Honor, my first witness would be Mr. Horn, Manager of Lloyd Center. I propose to cover a number of things with him. Shall I outline what I plan to cover with him and what he would testify to?

THE COURT: Let me hear about your own witnesses.

MR. NEIL: My own witnesses will testify to—

THE COURT: Who are they?

MR. NEIL: Mr. Tanner.

THE COURT: What does he do?

MR. NEIL: Part-time laborer.

THE COURT: He is not connected with the defense?

MR. NEIL: Pardon me?

THE COURT: He is not connected with the defense? He is one of your own witnesses?

MR. NEIL: He's one of the plaintiffs, right. There are three plaintiffs, Mrs. Wheeler, Mrs. Roberts and Mr. Tanner.

They will testify that they handed out leaflets within Lloyd Center on November 14, 1968. Two of them, Mr. Tanner and Mrs. Roberts handed out Plaintiffs' Exhibit 1.

THE COURT: Let me see Plaintiffs' Exhibit 1.

Where were they standing?

[7] MR. NEIL: At various places within the mall within what I call the main part of Lloyd Center. That is the area between that part of Lloyd Center which lies between Multnomah and Halsey, Ninth and 15th.

THE COURT: They handed out these leaflets and then what happened?

MR. NEIL: I would like to state Mrs. Wheeler handed out both leaflets; the other two just Plaintiffs' Exhibit 1.

Defendant's uniformed security guards approached them and told them to cease distributing these within Lloyd Center, that they could distribute them if they wanted on the exterior, on the public sidewalk outside of Lloyd Center; that if they continued to distribute this literature within Lloyd Center that they would be trespassers and that the defendant would cause their arrest.

In order to continue distributing and to avoid arrest, these plaintiffs did in fact go to the exterior sidewalk.

THE COURT: Mr. Miller, is that correct?

MR. MILLER: If your Honor please, Mr. Black had intended to make the opening statement for us.

THE COURT: All right.

MR. BLACK: Yes, your Honor. As I understood you to say, they would testify the police officers said what to them? I didn't get that.

MR. NEIL: Told them to cease distributing literature [8] within Lloyd Center; that they could distribute it if they wished on the exterior public sidewalk outside of Lloyd Center; that if they continued to distribute within Lloyd Center that they would be arrested or a warrant would be issued for their arrest for trespassing.

MR. BLACK: I don't believe we can agree that they were told they would be arrested. They were told, I think, within the opinion of the Lloyd Company, they would be trespassers. But, they were not arrested. And, as I understand the testimony, they were not told that they would be arrested.

THE COURT: You admit everything else except the fact the officer told them they would be arrested or a warrant of their arrest would be issued.

MR. NEIL: I would call the Court's attention to—

THE COURT: Maybe we are just wasting our time. Why don't you go back there. They are not going to arrest them. Is your point that they can pass out leaflets and will not be molested? If that is the case, what are we here for?

MR. BLACK: I believe, if your Honor please, we are trying the incident that happened on November 14th. You are putting your finger on one of the important questions of this case; and that is, whether by raising the incident that happened on November 14th and the questions related to it, whether the plaintiffs can thereby put the Lloyd Corporation into a position where they must declare themselves with regard to every situation [9] that would occur in the future. There is a serious question in my mind as to whether the plaintiffs can properly bring the Lloyd Corporation here and require it to make such a statement with regard to private property.

THE COURT: I think this is kind of a foolish defense very frankly. What are you trying to do? Are you trying to tell them: "Go out tomorrow, if you win, and get yourself arrested so the Lloyd Corporation can be sued properly?"

MR. BLACK: No, I don't want to bring that about as you can well understand. But,—

THE COURT: If these officers were so nice and gentle with them and said, "Go away, we are not going to arrest you. You are just trespassers" what are we here for?

MR. BLACK: Well, we have been operating there for nine years, if your Honor please; and we have never caused an arrest of anybody.

Our officers, I think the evidence will show, are directed not to arrest anybody for matters such as handbilling and things of that character. So, it seems to me under the circumstances, it is asking a little more than is proper to ask me to admit or to determine the question now as to what would happen in the future. There are all kinds of handbilling.

One of the principal issues in this case is the nature of this particular handbilling.

Also another issue in the case is the question of whether [10] when we asked them to do it on the public streets,

whether that was a proper and reasonable request which they complied with.

THE COURT: You are not going into that question. I know you permitted President Nixon to talk out there. You permitted other people to talk there. Maybe they didn't pass out any handbills. That is not the question he is asking you to admit.

The fact is: He wants to know whether you permit some people to do it and don't permit plaintiffs to do it. That is the only thing that we have to determine now.

I thought if the officer did in fact tell the plaintiff he would be arrested, it would raise the issue and we could determine the whole thing in this proceeding. That is all.

MR. NEIL: May I call the Court's attention to a part of a paragraph of the agreed facts which reads as follows:

> "Employees of the defendant advised the plaintiffs that if they did not cease distribution from the privately owned portions of Lloyd Center, they could be subject to arrest."

MR. BLACK: We agreed to that.

MR. NEIL: I agree to that also. I contend it was stronger than that. I agree that it went that far.

MR. BLACK: Then, the matter is covered by the agreed statement of facts.

MR. NEIL: I submit to your Honor that the question of arrest was somewhat stronger than they are stated here.

[11] THE COURT: I will let you put the evidence on.

MR. NEIL: Very well. The other thing I would prove by these witnesses, your Honor, is that the distribution at all times was peaceful and obstructed no one and caused no interference with the normal uses of Lloyd Center.

THE COURT: Is that admitted?

MR. BLACK: The question of normal use is a pretty broad term. It was peaceful. There is no question raised

about it being peaceful. As to whether it interferes with the normal use of Lloyd Center is another matter.

One of the positions of the defendant in this case is that Lloyd Center is designed and constructed and maintained on the basis that it does not permit hand billing or distribution of literature on matters, if your Honor please, that has nothing to do with the Center.

THE COURT: All right. I will permit you to put on evidence on that too.

MR. NEIL: All right fine, your Honor.

THE COURT: It is admitted they didn't bump anybody or push anybody?

MR. BLACK: That's right.

THE COURT: The question of normalcy is whether, if handbills are passed out, whether that interferes with people entering the stores?

MR. BLACK: Or the customer motivation that we devote the [12] premises towards, which is the broader question. You say "interfering with people going into the stores" did your Honor mean physically?

THE COURT: Yes.

MR. BLACK: Well, of course, that would depend on where they handbill and what the handbilling was.

THE COURT: I think one of the questions we are going to have to determine, and it may require testimony is: Can you waive for certain purposes and not waive for all purposes; isn't that one of the issues?

MR. BLACK: Well, your Honor—

THE COURT: I am one of the regular customers out there, so I know the place. I have been out there when they have had old cars all over the place, these antique and ancient cars. It is pretty hard to walk around there because they are there so much in the center court.

I was wondering whether you can permit antiques and ancient cars and you permit certain political organiza-

tions to use the auditorium and at the same time say, "We will not permit other organizations the same privilege."

MR. BLACK: I think my answer to that at this stage of the proceedings would be: So far as the antique cars and things of that nature is concerned, that the Lloyd Corporation has a classification of the things that it believes build business for the tenants, the merchants in that area.

[13] I think the testimony will show, if your Honor please, that there are a number of things that are done which they believe do increase this customer motivation.

Now, with regard to the question of handbilling, particularly handbilling that has nothing to do with the operation of the center, like the anti-war handbilling, I believe the evidence will show over the nine year period, that has always been disallowed or prohibited. Bars have not been let down on that at any time.

THE COURT: All right. I had hoped we could get down to the very legal questions involved without having a lot of controversy about the facts. Apparently that is not going to be possible.

So, have you any other witnesses besides your plaintiffs?

MR. NEIL: Our plaintiffs and Mr. Horn is all.

THE COURT: Go ahead and call Mr. Horn.

MR. NEIL: Mr. Horn, will you take the stand, please.

[14] RICHARD C. HORN was thereupon produced as an adverse witness in behalf of the plaintiffs, and having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE CLERK: Will you state your full name, your address and your occupation, please.

THE WITNESS: Richard C. Horn, 3030 N.E. Alameda Terrace; Manager of Lloyd Center; Portland, Oregon.

THE CLERK: Be seated, sir.

THE COURT: You are the Manager of Lloyd Center and have been for a number of years, haven't you?

THE WITNESS: Yes, your Honor, from the outset.

THE COURT: Go ahead.

DIRECT EXAMINATION

BY MR. NEIL:

Q When did the Lloyd Center open, Mr. Horn?

A August, 1960—July 28, 1960.

Q You are the top official in Lloyd Center; isn't that right, in the City of Portland?

A Yes, sir.

Q And, you are a member of the Oregon State Bar?

A Yes, sir.

Q And, have been since how long?

A Nineteen years.

Q Does the Lloyd Center maintain a uniform staff of [15] security guards?

A Yes.

Q That staff is about 12 men; is that right?

A Yes, 12 regulars and extras when we need them.

Q And, about four men per shift?

A Yes.

Q Is it true that the Lloyd Corporation applies to the City for commissions for all of these men as special city police officers?

A Yes, sir.

Q And, all of the guards do, in fact, hold such commissions?

A Yes.

Q Mr. Black commented about arrests that these guards may have made. In the past, these guards have made arrests in the Lloyd Center for things other than handbilling, have they not?

A I recall one at least where it was a matter of loitering and annoying the girls and the property on the ice rink and the skaters. That was the one instance I can recall.

Q Shoplifting?

A Shoplifting, complaint of the merchants.

Q A lot of arrests have been made or warrants sworn out for offenses other than handbilling; is that right?

A No. I say it could be confined pretty much to shoplifting on the complaints of the merchants; shoplifting or stolen credit cards and that sort of thing.

[16] Q Now, coming to November 14, 1968, you talked to two of these plaintiffs, Mr. Tanner and Mrs. Roberts about their handbilling on that day, did you not?

A Yes.

Q You talked to them after they had already been told by these security guards that they could not handbill within Lloyd Center; is that right?

A I did because I wanted them to understand possibly the problem.

Q And, you told them, did you not, that they could not handbill within Lloyd Center?

A Yes.

Q Did you tell them further if they persisted in handbilling either they would be arrested or a warrant would be obtained for their arrest?

A No, sir.

Q You did not tell them that?

A No, sir. They had already been told. I was only trying to explain, hoping they would understand why we didn't want them to do it.

Q You knew, in fact, at least Mr. Tanner had been told?

A No, I did not, no.

Q Didn't you have a memorandum from Mr. Boss that told you about what he told Mr. Tanner?

A There was one which I saw just the other day. I had [17] forgotten it.

Q Didn't that state in that memorandum—show the witness, if you will, Plaintiffs' Exhibit No.—

THE COURT: Who is Mr. Boss?

MR. NEIL: The chief of the security guards.

THE COURT: Where is he?

MR. NEIL: His deposition is admitted, your Honor.

THE COURT: Go ahead.

MR. NEIL: Show the witness Plaintiffs' Exhibit 12.

Q You agree that Mr. Boss told you he told Mr. Tanner that a John Doe warrant would be issued for his arrest—

A I agree that this note was sent to me.

Q So, you were aware if you read it that Mr. Boss had said something about arrest to Mr. Tanner, right?

A I should have been, yes, sir.

Q You had a discussion with both Mr. Tanner and Miss Roberts as to the reasons for the rule, I take it?

A Yes.

Q And, you told them—

A Not a complete explanation. But, one particular explanation people seem to understand and that is: If this is permitted by numerous bill passers, it litters the place and you couldn't keep it clean. I didn't go into the ramifications.

Q You explained there would be a littering problem if [18] handbilling was permitted, right?

A Yes.

Q And, the discussion even got legalistic with Mr. Tanner, didn't it? Didn't you discuss the *Logan Valley* case from the Supreme Court of the United States?

A He said he had a right to be here. I said, "We don't think so." He said, "Well, the *Logan Valley* case says we do." I said, "We don't think this applies to a situation such as this."

Q Okay.

A That's all.

Q And, your enforcement of the rule against these plaintiffs and these particular leaflets had nothing to do with the contents of the leaflet; is that correct?

A Yes. Basically, we don't permit any, no matter what it would say. It could have been going the other direction, urging people to enlist for the draft or not evade the draft, we wouldn't have permitted that either.

Q So, you didn't bar them from handbilling because of what the leaflets said?

A No, if I really thought about it, it might have been one more thing that I wouldn't have liked.

Q Did you in fact observe any littering going on from the leaflets?

A No.

Q Besides these two plaintiffs, there were several people [19] handing out these leaflets in the Lloyd Center?

A I saw them only after they were out on the sidewalk.

Q After they were on the sidewalk, they were there for quite a period of time?

A Yes.

Q Did you see any littering?

A I didn't look out there.

THE COURT: What do you mean by the statement: You wouldn't permit handbills to be handed out?

THE WITNESS: Well, your Honor, because of the annoyance we feel would be subjecting the customers to constantly have handbills pushed at them and because most people are courteous and in many instances they would take it and discard it, if we had a handbiller every 20 or 30 feet in the center, you could see what it would cause.

THE COURT: I would like to know what you mean by "permit": Assume that a person said, "I am going to

continue to distribute handbills." What does that mean? Would you say go ahead; but I am not permitting it?

THE WITNESS: No, I would not say, "Go ahead." I would go back and probably talk to counsel as to what we should do.

THE COURT: Who?

THE WITNESS: Counsel. And, we would ask for an injunction against the distribution and possibly a warrant for arrest for trespassing. I don't really know, your Honor.

[20] THE COURT: It didn't get that far on this particular occasion?

THE WITNESS: No. I haven't had the occasion in nine years. Everyone has always left. When we requested it, they do it. So, we haven't been up against the problem.

THE COURT: All right.

Q (By Mr. Neil) One more question on littering. Did you, in fact, see any of the handbills in question here lying around the Lloyd Center any place on November 14th?

A No. I didn't inspect the whole premises. I didn't see any in the area.

Q You didn't see any?

A Not within that particular area, no.

Q Did you see any within the area anywhere within Lloyd Center?

A I didn't inspect the whole center.

Q Did you observe on November 14th, any hostile public reaction to the distribution of these leaflets?

A One—Some lady asked what they were distributing. I said, "Handbills urging people not to accept the draft cards."

Q That lady came up to your office?

A I saw her down by the escalator down by the Aladdin. What she said was, "I am glad I didn't know what

it was. I don't know what I would have told them because my boy is flying a helicopter in Vietnam."

[21] Q She saw you down in one of the malls and came out?

A She just asked me what the problem was or what they were distributing.

THE COURT: I don't think the matter of littering is really important. Aren't there several Supreme Court decisions on that?

MR. NEIL: Yes, there are. I just wanted to bring out that there wasn't littering here in any event.

Turning now to the general policy in operation of the Lloyd Center, it's true that the malls and walkways within the center are open 24 hours a day; is that right?

A Well, they aren't physically closed such as putting a gate across, no. But, they are not—when people are there after hours, they are watched. And, if it is too late at night, they are told the places are closed and they should leave.

Q If I wanted to wal' through the center malls of Lloyd Center at 3:00 in the morning, would anyone stop me?

A Depending on who the officer was on duty as to what he is supposed to do. But, they would have made inquiry and followed you to see what you are doing.

Q Officer Ford testified in his deposition that if I went through the center malls of the center, I would be closely observed, but no one would stop me. Is that statement unfair?

A No, because Officer Ford has not been a regular man on the midnight shift. But, again, I don't know what every other [22] officer would do either.

THE COURT: How would that prove or disprove any issue in this case.

MR. NEIL: Nothing except to prove—

THE COURT: Let's get down to the issue that will prove something.

MR. NEIL: All right.

THE COURT: Let me ask you a few questions, Mr. Horn:

Do you have an auditorium at the Lloyd Center?

THE WITNESS: Yes, sir.

THE COURT: Is that used by many organizations without any cost?

THE WITNESS: No, sir. It's rented.

THE COURT: You rent it out?

THE WITNESS: Yes, sir, we do make a couple of exceptions, one being the Cancer Society.

THE COURT: I didn't hear you.

THE WITNESS: One of them being the Cancer Society. We let them meet once a year and the Boy Scouts can have it once a year and the Camp Fire Girls once a year with no charge. Everyone else pays a rental fee.

THE COURT: But there are some public organizations, I think the Zoo used it one year, didn't they?

THE WITNESS: I believe, your Honor, about the first year in operation, I think we asked them to bring in some animals [23] because of the attraction, is all I remember.

THE COURT: So, there are some organizations that use the facilities without paying any fees. And, there are other organizations that are required to pay a fee for the use of the facilities?

THE WITNESS: There are I think two or three, Cancer, Boy Scout groups, Girl Scouts use it once a year, yes, sir, without charge. The rest of them pay.

THE COURT: Within the past year or so, wasn't there a dispute between the School Board and the teachers in which the facilities of the Lloyd Center were used on sort of a regular basis by the union and by the School Board?

THE WITNESS: Yes, sir. It was, but they paid for it. And, when they wanted it again, we told them if they didn't take better care of the premises, we wouldn't even rent it to them.

THE COURT: So you do make a distinction between people who use the auditorium facilities either for pay or not for pay and those people who come onto the premises in the mall and want to use it for their own purposes?

THE WITNESS: No, because the auditorium is private property. But, we share the malls. We say that the malls of the Lloyd Center are private property.

Your Honor, so we allowed the presidential candidates that you mentioned awhile ago. We do that for one reason and that is great public interest. It is secondary at least and maybe [24] first, it brings a great many people to Lloyd Center who may shop before they leave.

THE COURT: I mentioned earlier those ancient cars. Do you remember those exhibitions?

THE WITNESS: Yes, sir.

THE COURT: They were there on Saturdays and Sundays.

THE WITNESS: Friday nights and Saturdays. And, I think we pay the Antique Car Dealers Association I think 600 to $700 to bring the cars in for display because we think it brings people. And, when we bring people, we bring shoppers.

THE COURT: In other words, sometimes you bring in various organizations and perhaps persons into the malls for the purpose of encouraging trade?

THE WITNESS: Oh, yes, sir. The purpose of most—perhaps of all our activities in the center is to bring people and make them enjoy it while they are there, and hopefully that they will get the habit and want to come back.

THE COURT: Is there anything further?

MR. NEIL: Yes.

Q (By Mr. Neil) Let's go into some other activities that you have allowed on the malls without charge.

You have, for example, allowed sale of buddy poppies by the American Legion; is that right?

A Yes.

Q That was within the mall area?

[25] A Yes, sir.

Q You have allowed solicitation of funds at Christmastime?

A Excuse me. The sale of poppies is correct; but, they are confined to selling at a table at about three locations. They could not walk around and solicit.

Q Three locations in the mall?

A Yes.

Q You have allowed solicitation of funds at Christmastime by bell ringers of the Salvation Army and Volunteers of America?

A We had them for two reasons; One of them being, we think it's a recognized charity, because everyone knows the Salvation Army is taking care of the poor and wayward people.

Secondly, we think it actually adds to the Christmas atmosphere.

THE COURT: Actually what?

THE WITNESS: Adds to the Christmas atmosphere that people have been brought up by in hearing the bells at Christmastime.

Q (By Mr. Neil) You have allowed those bell ringers everywhere in the malls?

A No, at specified locations. And, they were told at the outset that if they do not conform in any respect that they will have to leave and will not come back.

Q If it adds to the Christmas atmosphere, wouldn't you rather have them in more than three locations?

[26] A I didn't say three, sir on this one.

THE COURT: I don't see what that has to do with it. He is just telling you what has happened.

Q (By Mr. Neil) All right, your Honor. You have had Veterans Day observance put together by outside veterans located in the malls; is that right?

A We invited them.

Q They occurred there?

A Oh, yes.

Q They didn't pay a fee, did they?

A No, no.

Q You have had Boy Scout displays in the malls many times, isn't that right?

A Oh, yes. We try hard to get this every year because people like it.

Q No charge for that?

A No. We'd pay them if we had to to get them.

Q You have had presidential candidates and election rallies in the malls on occasions, haven't you?

A Yes, sir.

Q Even primary candidates election rallies where you have gotten more than one candidate on each side, haven't you?

A No, sir.

Q Well, let me ask you this—

A Excuse me.

[27] Q Speaking of the presidential primaries—

A Yes, sir, we had McCarthy—Mr. McCarthy, Mr. Kennedy—

Q You have had football rallies in the Lloyd Center, have you not?

A We have invited them. We want them.

Q Pardon?

A We want them.

Q You have had them in the malls, right?

A Sure, because we want them.

Q It would be fair to say, wouldn't it, that the rallies such as the election rallies and football rallies certainly obstruct and impede traffic much more than these plaintiffs did?

A I don't think that is the complete point.

Q Answer my question if you will. Isn't that true?

A Will you repeat the question please?

THE COURT: The question is: Have these presidential candidate rallies and football rallies been more obstructive to traffic than these plaintiffs?

MR. NEIL: Pedestrian traffic within the Lloyd Center.

THE WITNESS: It would in the central plaza itself; not in the malls.

Q Where they occurred?

A We want them.

THE COURT: Mr. Horn, answer the questions. You are a [28] lawyer. I thought your son was a lawyer. But, you are a lawyer also.

THE WITNESS: He is a better one. I never practiced, your Honor. I never practiced law.

THE COURT: Just answer his questions. Mr. Black and Mr. Miller are both admitted to the Bar. They know how to ask questions.

THE WITNESS: All right, sir.

Q (By Mr. Neil) At various times at Lloyd Center, there has been an information booth where things like the Rose Festival pins have been sold, right?

A They've been available to purchasers, yes, sir.

Q And, literature has been handed out or available for distribution at that booth on such things as the zoo, the Grotto; right?

A For tourists.

Q Pardon?

A For the benefit of tourists.

Q But, those things have occurred; is that right?

A Yes.

Q You testified, I think in your deposition, you have turned down some organizations—outside non-profit organizations from using the malls?

A Many many of them, right.

Q The example you gave in your deposition was like the [29] March of Dimes and the Hadassah?

A I could give you many many more if you would like.

Q Okay. How do you draw the distinction—what in your mind is the distinction between those you allow to use the malls and these outside non-profit organizations and those you don't allow to use them?

A Well, we—I readily concede that the Veterans is an exception to our policy. Maybe, the better we feel people who go through what they have gone through for this country, people are sympathetic with them generally and would not object.

Q You, in fact, take into account whether you think they are charitable or not; is that one factor?

A No, because many of them are. It's just a matter of limiting it. We simply couldn't have them all. We made one or two exceptions, true.

Q Let me ask you if you didn't testify at page 12 —may I approach the witness, your Honor?

THE COURT: No. I think we have gone over that long enough. I don't think by adding 15 more organizations that we are going to establish a principle more than what you have done.

MR. NEIL: I only wanted to take up the distinction, your Honor, as to why he allowed some and turned down others.

THE COURT: Read him what he said before.

MR. NEIL: I will ask you if you didn't testify as follows in your deposition taken May 29, 1969 at page 12, line 18:

[30] "We do not feel that every time anybody comes to the center that they should be solicited or heaven knows what, things that may be charitable or not charitable, and we cannot determine always what is and what isn't."

THE WITNESS: Yes.

MR. NEIL:

"Q It is pretty much, then, your judgment as to which causes you approve of and which you don't; is that right?

A Judgment plus the fact maybe we like one particular group such as the Veterans, the hospitalized veterans, we think they should have some help.

Q You like them better than, for example, you like Hadassah; is that right?

A Well, no, but Hadassah, that particular thing is a—something not generally as—not generally accepted as a charitable thing by most of the people, by the majority of the people, something foreign to this area."

Did you give that testimony at that time?

A Yes, sir.

Q Now, I want to ask you a couple of questions about the layout of Lloyd Center. I have been referring to the area between Multnomah, Halsey, 9th and 15th, as the main part of Lloyd Center. You used the term center. You know what area I am talking about, [31] don't you?

A Uh-huh.

Q Do you?

A Yes, sir.

Q I might ask that you be handed the aerial photograph which is Plaintiffs' Exhibit 4.

THE COURT: What is the purpose of these questions?

MR. NEIL: I want to establish that the area in which the plaintiffs sought to leaflet occupies the majority of the geographic area of Lloyd Center and has the greatest pedestrian and auto traffic and that sort of thing.

THE COURT: Where were they distributing the literature?

MR. NEIL: Within what I call the main part of Lloyd Center; that is the single complex bounded by Halsey, Multnomah, 9th and 15th. It can be shown on this photograph that Mr. Horn has.

THE COURT: Is that where Meier and Frank is?

THE WITNESS: They were down where Meier and Frank store is.

THE COURT: I know where that is.

MR. NEIL: All right.

THE COURT: That's right near the skating rink.

THE WITNESS: Right.

Q (By Mr. Neil) Almost all of it is right around in here. And, the mall is right around the skating rink?

[32] A Yes.

Q It is true that what I call the main part of Lloyd Center occupies more than one half of the geographic area of all of Lloyd Center?

A No, sir. I don't believe so, because you talk about the largest part here that runs about 20 acres in size. I think Lloyd Center is something like 50 acres.

Q Show the witness Exhibit 3, if you will, which is a map of Lloyd Center.

(Document handed to witness.)

Counsel agreed, Mr. Horn, the area on that map which is the heavy black line, I think you can see it there is the Lloyd Center.

A Yes.

Q You agree with that?

A Yes, sir.

Q Isn't it true that the area I have described as the main part of Lloyd Center is more than half the geographical area of Lloyd Center?

A Looks like it on the map. I know we have 50 acres. The largest part of the center there consists of only about 20.

Q Lloyd Center Corporation has some property that isn't within Lloyd Center; is that right?

A I am talking about the 50 acres we are supposed to have in the—I haven't gone out and measured it.

[33] THE COURT: I think we are wasting a lot of time.

MR. NEIL: In the pretrial order, we have agreed—

THE COURT: If you have agreed upon it, go ahead to something else.

Q (By Mr. Neil) Are the majority of the businesses and stores, professional offices that are tenants, a majority of them are located within what I call the main portion of Lloyd Center?

A Yes, sir.

Q Would it be a fair statement to say that the greatest or a greater shopper pedestrian and automobile parking occur within the main part of Lloyd Center than other parts of Lloyd Center?

A Yes.

MR. NEIL: That's all.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. MILLER:

Q Mr. Horn, what basis do you use for distinguishing—first, let me ask you how many charitable groups have you permitted to solicit in Lloyd Center?

A All I can think of at the moment is the American Legion, poppies and Salvation Army and the Volunteers of America.

Q The Salvation Army and Volunteers of America being at Christmastime?

A Yes.

[34] Q Approximately how many groups have asked you for permission to do similar things?

A Like I say, 30 or 40 or 50, any of those would be numerous times, particularly in the early years of the center.

Q Did you give the others permission?

A No, sir.

Q Why not?

A Because we felt—these included petition signers for the sales tax—against the sales tax; fluoridation of water and what have you, market surveys, college and high school kids selling tickets; Beaver baseball, Oregonian and Journal selling, it's just that the customers do not want to be annoyed. We firmly believe that the customers that are invited are distracted. It isn't the pleasant shopping that we should have in Lloyd Center.

Q How often during the year do you have an information booth in Lloyd Center?

A We have it during the summer months. And, 90 percent of it is for the purpose of tourists that we have.

Q How is it staffed?

A We have an information girl who tells tourists how to get out of town and where the various—the Columbia River is and how to get to the coast and where they can buy things at the various stores.

Q Does she tender any of these leaflets about the zoo and [35] other tourist attractions?

A When they ask what there is to see in Portland, she would say: There is a zoo; there is a pamphlet on the zoo.

Q Does she give these things only to people who ask for them?

A Oh, yes.

Q Does she—

A They are there under the shelf. And, we don't pass them out.

Q What candidates for; what political office have you had in Lloyd Center?

A The political offices I can think of in the first year or two of the election, every county commissioner; every city commissioner; every legislator, we had no problem in recent years because they know we do not want it. So, then it's been down to the presidential candidates that we have invited recently. We recently had the Democratic and Republican Parties. We told them this space was available and we would like to have Mr. Kennedy, Mr. McCarthy, Mr. Nixon. We would like to have them. We would like to have them use our facilities.

Q Did you give permission to the first category candidates that you talked about, the commissioners and the like to come there and campaign?

A No, no. We asked them not to do it.

Q What political candidates have you given permission to [36] come there and talk?

A The presidential candidates.

Q The President of the United States?

A Tom McCall was running for governor, he went down to the ice rink to a women's club where they were skating and was giving them cards. We told him he couldn't do it. So, he left.

THE COURT: I didn't hear what you said. Tom McCall did what?

THE WITNESS: Went down to the ice rink where we had a women's club skating to meet the ladies and to politic. We told him he had to leave, he couldn't do

it. We didn't permit it. So it was the presidential candidates only.

THE COURT: How about the mayor, have you ever turned him down too?

THE WITNESS: Who?

THE COURT: Mayor Schrunk.

THE WITNESS: He never asked. But, we wouldn't have let him. We would have told him.

THE COURT: Even though he determines whether you are going to have special police out there or not? (laughter)

THE WITNESS: Well, I would take it upon myself to tell him he couldn't do it.

Q Do you specifically invite the presidential candidates?

A Yes, sir, to the Central Committee in Oregon of both parties.

[37] Q How frequently have you had the presidential candidates?

A We had the three the last time. We had Mr. Rockefeller one time, John Kennedy another time.

THE COURT: I think we are getting far afield. We have covered all that about the presidential candidates. If you want to talk about something, find out what veterans' organizations he has permitted there and which ones he hasn't. I think the point was made that charitable organizations were permitted if Mr. Horn liked them. If he doesn't like them, they don't come in. For example, if he likes the American Legion, that's fine. If he doesn't like the Veterans of Foreign Wars, he doesn't permit them to sell poppies. That is what I understood. If I am incorrect, you go ahead and bring out what veterans' organizations he likes and which he doesn't like and which he permits and which he doesn't permit.

Q (By Mr. Miller) Which veterans?

A I have no feeling for the American Legion. I

have a feeling for the people that are up in the hospital. I think every citizen does have. The veterans, if anyone deserves some comfort and support by the people of the United States, they are the people who have given something that the rest of us have not given.

As far as the American Legion is concerned, if they would come in and be at one certain post, we say, "You can come in on three tables. You cannot solicit. You cannot run around [38] and ask the people for anything." Three tables have been allocated for that.

Q How many days a year have you permitted those poppies?

A I am not sure, maybe a Friday or Saturday once a year; maybe only one day; I don't remember.

Q But, it was either one day a year or one or two days a year each consecutively?

A Yes. The American Legion come down and wanted to do something else, we wouldn't permit them.

Q Have you permitted any other veterans organization to solicit there?

A No, no. I am not a member of any veterans organization either. I have no feeling for them other than the sympathy for those who have been ill and who have been hurt.

THE COURT: How about the Rose Festival tables; have you permitted them to sell buttons in the malls?

THE WITNESS: No, sir, your Honor, because the Rose Festival sent out these plaques, you know, with buttons and people can buy them if they wanted to. The last year, I think it was the first time we had one on the information booth. Anybody wanting to could pick one off and, of course, give the girl a dollar for it. We have no selling by anyone. The Oregonian and Journal doesn't sell in the Lloyd Center.

The Boy Scouts and Camp Fire Girls don't sell candy or cookies there either.

[39] THE COURT: You don't permit it?

THE WITNESS: No, sir.

THE COURT: The only exception is the poppies?

THE WITNESS: Yes, poppies and the Salvation Army, poor old Salvation Army.

THE COURT: What kind of Salvation Army?

THE WITNESS: The very poor Salvation Army.

THE COURT: I didn't hear what you said.

THE WITNESS: The very very poor Salvation Army.

THE COURT: Are there two kinds of Salvation Armies?

THE WITNESS: No, sir, they are poor.

THE COURT: Go ahead.

Q (By Mr. Miller) Why do you have events such as the antique car display at Lloyd Center?

THE COURT: I think he has already explained that before. He pays them $600 to get the people there on Saturdays and Sundays.

THE WITNESS: Uh-huh.

Q Have others in the past sought to distribute handbills in Lloyd Center prior to November 14, 1968?

A Many of them.

Q What occurred on those occasions?

A We asked them to please go out to the public area in the center which is out on the sidewalk; and, they have all done it. There have been no problems.

Q Would you describe the area between 9th and 15th and [40] Multnomah and Halsey Streets in the Lloyd Center.

A That is the largest part of the center. It is just one building really. We have big structures there that except for several structures that go down through the structures; the rest of the stores are on top of the structure, which is part of the building.

Q How far is the sidewalk where you asked these people to handbill from the Lloyd Center businesses?

A Right smack up against it, adjacent. You don't have to walk across anything, it's right there.

Q What businesses are right adjacent to those sidewalks?

A Newberry's, Pay 'N Save Drugs, First National Bank, Rotary Bakery, McCall Oil, Goldberg's Restaurant, Portland Federal Savings and Loan.

THE COURT: That is just on one side. But on the other side facing the Sheraton Hotel and the park, there is quite a distance.

THE WITNESS: Only Meier and Frank is the only one there. Meier and Frank store fronts on the sidewalk.

Q (By Mr. Miller) What facilities—What do you call the area between the stores at Lloyd Center?

A Malls or common areas.

Q Are they referred to as common areas in your lease?

A Yes.

Q What do those common areas consist of in way of [41] facilities?

A Well, there are two ten-foot covered sidewalks. And, right in the middle of it, is another 30 feet. Then, there are planters of flowers, statuary trees and benches.

Q Are there any elevators?

A Elevators, escalators.

Q Bridges?

A Bridges.

Q What part of the area is covered?

A Well, I think the whole center—most of the largest part of the center is covered. The parking area down below, something like 20 acres is covered. The common area, the malls, 20 feet of the 50 are enclosed plus the bridge, plus the area over the ice rink and some of the malls that go out to the side are completely covered.

THE COURT: How does this go to prove or disprove any issue in this case?

I am amazed, Mr. Miller. I asked you yesterday about this case. I thought all of these undisputed matters could be stipulated to. You have been asking him questions and Mr. Neil has been asking him questions about which there is absolutely no dispute at all and taking up the time of the Court when it could have been written out the way I asked you to. I told you you ought to put this down in writing. Maybe you are too busy to handle cases in the Federal Court, Mr. Miller. Maybe you have got [42] too important clients. We have been here close to an hour talking about irrelevancy all the time and nothing of a controversial nature. The only controversial matter has been whether he actually threatened them with arrest or didn't threaten them with arrest. Everything else has been admitted. And yet you have been wasting time, both of you. This is not the rule of this Court, and you know it.

MR. BLACK: May I say this—

THE COURT: I didn't talk to you, I talked to Mr. Miller.

MR. BLACK: I didn't mean it that way. I meant there is a statement of agreed facts in the pretrial order. And, that is as far as we could go. It is our feeling that in view of the decisions, particularly the *Logan Valley* case that it is essential in this case to show the nature of the malls that are in question. And, in order to do that, we just have to have the testimony because it wasn't admitted.

THE COURT: Was it asked to be admitted?

MR. BLACK: I don't know. I can't answer that.

THE COURT: Mr. Miller, did you ask Mr. Neil to admit the testimony that he is now giving about the description of the malls and the distance from the various parts?

MR. MILLER: That was gone into to some extent, your Honor. And, we have a statement that these were facilities for the convenience of the customers. And, that wasn't admitted.

[43] THE COURT: What wasn't admitted?

MR. MILLER: That those facilities were for the convenience of customers.

THE COURT: Those are the conclusions. He has been talking about the facts most of the time.

MR. MILLER: If your Honor would like to continue with respect to the reasons and some testimony about the maintenance cost of these areas that are paid for by the—

THE COURT: Tell me the case upon which you rely concerning maintenance costs. Why is maintenance cost important?

MR. MILLER: We believe—

THE COURT: Give me the case upon which you rely.

MR. MILLER: In the *Logan Valley* case, your Honor, the *Amalgamated Food Employees Union* vs. *Logan Valley Plaza*, there was a great deal of discussion by the United States Supreme Court of the United States in that case.

THE COURT: Tell me the facts of the case.

MR. MILLER: The plaintiff in the case—there were two plaintiffs, the Logan Valley Shopping Center and Weis Market.

The Logan Valley Center owned the Logan Valley Center. Weis owned the real estate in which he operated a supermarket. There were two stores existing in that shopping center at the time of the controversy.

THE COURT: What was the controversy?

MR. MILLER: The labor union members came to the center [44] and picketed the Weis Market.

The Logan Valley Center and the Weis organization petitioned the courts of Pennsylvania for an injunction

to enjoin those pickets from trespassing upon the Logan Valley and the Weis lands.

The courts of Pennsylvania enjoined those pickets from doing so. That was affirmed by the Supreme Court of the State of Pennsylvania.

THE COURT: What was the picketing about?

MR. MILLER: It was about the non-union character of the Weis employees, your Honor.

The Court in that case—the United States Supreme Court in that case spent a great deal of time, a number of pages discussing the character of the center and how it was that those pickets dealing directly with the matters going on in the Weis store could not do so adequately except within the center near the Weis store.

Here, this handbilling deals with the matter not related to something going on within Lloyd Center. And, it is our position that it can be done adequately from the public sidewalks which abut the Lloyd Center.

It is our position it can be done anywhere else in this city or in the country for that matter and that it's not necessary in this case as it was in the *Logan Valley* case for these plaintiffs to be permitted to come into the mall area upon which [45] our clients and its tenants invest very substantial sums of money every year for the purpose of maintaining statuary and flowers and to keep the place pleasant for shoppers to bring them back. We think it is different from Logan Valley. We think it is different for those reasons because of the things that Mr. Justice Marshal talked about in the *Logan Valley* case.

THE COURT: Mr. Miller, this is a question of free speech in this case. This is not a question of a union. The question here is: Can one organization say to the American Legion, "We will permit you to come on our premises." and then say to the Veterans of Foreign Wars, "We are not going to permit you to come onto our premises."

The question seems to be: When you give one organization certain rights and privileges, have you opened up the premises to all organizations? That seems to be the question. It is not how many feet of space there is for people to walk on and where can the people who frequent this mall be best reached. I don't see that at all. I think you have gone into the character of the premises very well. I know this place. I have been on there a hundred times. If you are doing it for my purpose, it is not necessary for you to do it.

MR. MILLER: We think it is important to show the tenants have a very important interest here too. I want to demonstrate that by asking some questions about it.

THE COURT: What case are you going to rely on for that? [46] What is the authority?

MR. MILLER: I don't have the specific case.

MR. BLACK: Would your Honor permit me to make a very short statement?

THE COURT: Mr. Black, perhaps you don't know how we operate here—

MR. BLACK: I asked your Honor's permission to make a short statement.

THE COURT: I realize you are the head of the firm. If you don't want Mr. Miller to say anything, that is perfectly all right. But, there is going to be one person asking the questions and one person trying the case. If you are dissatisfied with Mr. Miller, you are the head of that office, you can stop him any time and I will let you finish.

MR. BLACK: He is my lawyer. I am very satisfied. I thought maybe I could assist the Court in connection with the *Logan Valley* case. I have read it as careful as possible. There were a couple of questions your Honor asked that I would like to answer them. May I say a word about it?

THE COURT: All right. Then, you don't ask any more questions.

MR. BLACK: I just wanted to say this: Your Honor asked Mr. Miller a moment ago what case he relied upon asking about the comparisons between the situation at the center and public streets.

[47] We have a brief that was served on us by Mr. Neil in which one of the cases he relies on is the case of *Marsh* against *Alabama*.

In this case of *Logan Valley*, which I believe is the leading case on this entire question, one of the questions —the principal question in that case is whether this Weis Market of the Logan Valley Plaza was comparable to a city street.

One of the cases that it relied upon was the case of *Marsh* against *Alabama* which is a case that is relied upon by Mr. Neil.

We think in the presentation of the defense of this case that it is important for the Court to know and it is an essential element to determine whether the mall at this particular Lloyd Center is comparable to a public street. We think that in the Supreme Court of the United States that Mr. Thurgood Marshall devoted several pages to that discussion. So, that is the reason we felt that it's necessary to show the condition of the Lloyd Center, you see.

THE COURT: I think you have shown it adequately. I think that in the future, Mr. Miller, when you are coming here to try a case and I ask you to set down in writing what your witnesses are going to testify to, you do it.

MR. MILLER: Yes.

THE COURT: Then we will not be wasting all this time.

I am surprised at Mr. Neil not complying with this [48] request that I made yesterday.

MR. NEIL: Your Honor, I want to say in all defense of myself, I submitted many more agreed facts than I was able to get agreement on. If you will look at my contentions in the pretrial order you will see what I asked them to agree to.

MR. MILLER: In that regard also, your Honor, we were willing to submit statements of what our witnesses were going to say. In a very brief conference the other day, it was decided that would not be done. We were prepared to do so, but it wasn't done.

THE COURT: All right.

Q (By Mr. Miller) What work is done in maintaining the malls, Mr. Horn, the common area?

A Well, in the cleaning first, we sweep the malls every morning about 4:30. We have men all day sweeping up to get the debris up. We have three gardeners who do nothing but landscaping and maintaining the flowers and trees. We go beyond to maintain the painting, anything that needs painting and lot striping, policing and taking care of the elevators.

Q How much money is spent in that manner?

A Oh, in excess of $350,000 a year.

Q Who pays for it?

A The tenants of Lloyd Center.

Q Is that—

A Including Lloyd Corporation. We are tenants also. We [49] rent office space.

Q Is that paid for in the form of additional rent?

A Yes, sir.

Q Mr. Horn, has any merchant complained to you of handling in the malls?

A In the past, yes, many times, in the early days; we haven't had any to speak of in the last few years.

Q Why do you try to keep handbilling out of the malls?

A Well, I think, as I probably said awhile ago, because I think it's annoying to customers. We think it disturbs the happy comfortable atmosphere I think we have created. I think it is a distraction.

Q Is it your desire to avoid controversial matters going on in the malls?

A Oh, yes, sir. Like any business, I want to do business with everyone. We don't want any controversy. Everyone is entitled to his own belief. We don't want any controversy that other people could feel uncomfortable or unhappy about.

Q If you permit one group to handbill, are you afraid that would invite controversy if you turned others down?

A Well, the other people would be extremely unhappy if we didn't let them do it. I think it is either to let everyone do it or no one do it.

THE COURT: There might be a waiver. If you let the Veterans of Foreign Wars use it and don't let the American Legion [50] use it, that is the very point I am trying to bring out, have you already waived.

THE WITNESS: I can say this: I didn't think I could—I didn't think they could go back there again if we didn't want them or if they did something we didn't approve of.

MR. MILLER: I have no further questions.

MR. NEIL: I have nothing further.

THE COURT: That's all.

Call your next witness.

MR. NEIL: Call Mr. Tanner.

[51] DONALD McLERAN TANNER was thereupon produced as a witness in behalf of the plaintiffs, and having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE CLERK: Will you state your full name and your address, please.

THE WITNESS: Donald McLeran Tanner.

THE CLERK: Your address.

THE WITNESS: 906 S.E. Ankeny, Portland, Oregon.

THE CLERK: Be seated, sir.

DIRECT EXAMINATION

BY MR. NEIL:

Q Mr. Tanner, you are one of the plaintiffs in this case?

A Yes.

Q Were you handing out leaflets, Plaintiffs' Exhibit 1; at the Lloyd Center on November 14, 1968?

A Yes.

Q Doing so in the area right outside the Lloyd Center —the Meier and Frank entrance at the central mall?

A Yes, sir.

Q And, did any security guard come up to you that day?

A Yes.

Q What did he say to you?

A He said they had a policy at Lloyd Center not to permit people to hand out handbills and that if I wanted to pass out [52] handbills in the area, I would have to go out to the public sidewalk.

Q Did he say anything to you with respect to arrest?

A No.

Q Did any other person attached to the Lloyd Center say something to you with respect to arrest?

A Yes, the chief of the security force.

Q That is Captain Boss?

A Yes.

Q How did you get to Captain Boss presence?

A I told the security officer that I wanted to talk to the people who were in charge of the policy at Lloyd Center.

Q Then you were taken to Captain Boss?

A Yes.

Q What did Captain Boss say to you with respect to arrest?

A He said that if I refused to leave Lloyd Center I would be arrested for trespassing.

Q Did you have any further questions with any officials at Lloyd Center?

A Yes. I talked to Mr. Horn.

Q And, did Mr. Horn say anything with respect to arrest?

A He said essentially the same thing that Captain Boss said, if I did not leave, I would be arrested for trespassing.

Q Were you leafleting alone that day?

THE COURT: I didn't hear you.

[53] Q (By Mr. Neil) Were you handing out leaflets by yourself that day?

A Yes.

Q But, to your knowledge, were there others also handing out the same leaflets?

A Yes.

Q About how many in the Lloyd Center that you knew of?

A I knew of about five.

THE COURT: How many?

THE WITNESS: Five.

Q But, they weren't with you; is that right?

A No.

THE COURT: Do you know where they were?

THE WITNESS: Yes.

THE COURT: Where?

THE WITNESS: Some of them were out on the—all of them were out on the public sidewalk that I saw.

THE COURT: Some of them were in the malls near where you were handing out leaflets?

THE WITNESS: When I arrived, some of them were in the malls. But, they were told to move to the sidewalks also; and, they had done so.

Q (By Mr. Neil) You saw these other people when you left to go out to the sidewalk; is that right?

A When I was arriving, I saw one other person in the mall. [54] When I went out to the sidewalk there were three other people already there.

Q What did you do when told to cease distributing or you might be arrested? Did you continue to leaflet in Lloyd Center?

A No, I left.

Q Why?

A Because I didn't want to be arrested.

Q Now, did you block any traffic, pedestrian traffic in handing out leaflets?

A I don't think so.

Q Did you see anybody else do so?

A No.

Q Was that true in the public sidewalks as well as in the Lloyd Center?

A Yes.

Q Was there any hostile public reaction from any passerby when you passed this out?

A Just one comment.

Q What did—Was she a lady?

A She said something like, "Drop dead" or something like that.

THE COURT: I didn't hear what you said.

THE WITNESS: She said, "Drop dead" or something like that.

Q (By Mr. Neil) Is that the only incident?

[55] A Yes. Well, one lady was arguing with the policeman to leave me alone.

Q Was that when you were in Lloyd Center?

A Yes.

MR. NEIL: Nothing further.

CROSS-EXAMINATION

BY MR. MILLER:

Q Mr. Tanner, the Lloyd Center people were courteous to you when they discussed this matter with you?

A Yes.

Q The one man was somewhat apologetic to you?

A Yes.

Q You engaged Mr. Horn in a conversation about the private and public character of Lloyd Center, did you not?

A Yes, I did.

Q You told him it was private—you told him it was public?

A I though it was a public place, yes.

MR. MILLER: If your Honor please, we will offer Exhibit No. 54.

MR. NEIL: No objection.

THE COURT: What is it?

MR. MILLER: It is a written report by Mr. Tanner of the events that occurred.

THE COURT: Any objection?

MR. NEIL: None.

[56] THE COURT: What other exhibits do you want to offer?

MR. MILLER: I would like to offer Exhibit No. 56.

MR. NEIL: I don't have any objection to that.

THE COURT: How about 54 to 59 inclusive?

MR. NEIL: Yes, I object to 57; I object to 58; I object to 59.

THE COURT: "The resistance notes" what is that?

MR. NEIL: These are publications mailed to Mr. Miller by the Resistance in April of 1969, long after the events in question here. I contend they are irrelevant.

THE COURT: When did the events take place here?

MR. NEIL: November 14, 1968.

THE COURT: Are you a member of the Resistance movement? What do they call the organization?

MR. NEIL: Your Honor, the testimony is in the deposition that The Resistance is not a formal organization. It is an informal organization called The Resistance.

THE COURT: Is this the one at Centenary Wilbur Church?

MR. NEIL: Yes, it is.

THE COURT: What is the undated letter to Robert from Betsy? Who is Robert and who is Betsy?

MR. MILLER: I am Robert, your Honor, and Betsy is the plaintiff, M. s. Wheeler.

MR. NEIL: I object also to that, not on the authenticity, but on the relevancy on the ground that counsel is offering these [57] exhibits, your Honor, to establish the Plaintiffs' belief that they advocate certain viewpoints and certain beliefs. I contend that is irrelevant. We have to judge by the contents of the leaflets here.

THE COURT: I think that is right. But, what about the resolution adopted by Lloyd Center?

MR. NEIL: That resolution was dated February 11, 1969 to the effect that the Lloyd Center merchants don't want people like our clients to use the malls. I think that is irrelevant too.

THE COURT: I will take them under advisement.

(Whereupon Defendant's Exhibits Numbers 51, Deposition of Donald M. Tanner; 52 Deposition of Betsy Wheeler; 53, Deposition of Susan Roberts; 54, Written statement of Donald M. Tanner dated November 26, 1968; 55, 24 photographs of Lloyd Center; and

56, Lloyd Center lease form provision applicable to common areas, operation and right-of-way were received in evidence. 57, Resistance notes dated April 15, 1969; 58, Undated letter to Robert from Betsy; 59, Resolution adopted by Lloyd Center Merchants
[58] Association dated February 11, 1969, were objected to and taken under advisement.).

THE COURT: Go ahead, Mr. Miller.

CROSS-EXAMINATION (CONTINUING)

BY MR. MILLER:

Q Mr. Tanner, when Captain Boss talked to you, what he said about arrest was that he could obtain a John Doe warrant for your arrest; isn't that what he said, Mr. Tanner?

A He said he could do that if I refused to give him my name.

Q But, he didn't say that he would arrest you, did he?

A He said he would have the Portland Police to arrest me if I did not leave.

Q He also mentioned John Doe warrant if you didn't give him your name?

A He asked me my name. I refused to give him my name.

Q When you left the Lloyd Center, you didn't distribute any more leaflets that day, did you?

A No.

Q Did you go to the meeting that night at the Centenary Wilbur Church that was advertised by the leaflets?

A Yes, I did.

Q Were draft cards turned in at that meeting?

MR. NEIL: I object to anything that happened at that
[59] meeting. It has to be judged by the contents of the leaflets.

THE COURT: I think that is right. What difference would that make?

MR. MILLER: The leaflets, if your Honor please, does state on its face that it is inviting the public to a meeting where the community will sever its resistance with the Selective Service. And, it states that the people—

THE COURT: Doesn't the leaflet speak for itself?

MR. MILLER: I think it is subject to some interpretation. I think the aim of the plaintiff in passing out the leaflet—

THE COURT: How does that determine whether Captain Boss was correct in stopping him or not stopping him; isn't that the issue?

MR. MILLER: The property involved here, your Honor, is private property.

THE COURT: I am admitting that. Let's assume that to be true. How would your right be enlarged any by what was said that evening or six months later? How are you going to get any comfort from that?

MR. MILLER: It may be that a private property owner in some circumstances is required to permit people to come on and exercise First Amendment rights. But, it is our position that if the person distributing the literature is advocating the violation of the Selective Service laws—

[60] THE COURT: I would like to know the case upon which you rely.

MR. MILLER: We rely on the *Gara* case.

THE COURT: Tell me what the facts are in the *Gara* case.

MR. MILLER: The facts in that case are: A college professor had told a young man not to permit the Selective Service people to coerce him into registering for the draft. And, he was convicted.

THE COURT: How is that important here?

MR. MILLER: We think the leaflet involved does advocate the violation of Selective Service laws.

THE COURT: Then you have the leaflet. If you think so, why do you have to find out what happened that evening or some other time? How could the head of security make a determination on the basis of a meeting that was not yet held?

MR. MILLER: The intention and the purpose of the people in passing out the leaflet goes, I think, to the determination of whether what they were doing was lawful or unlawful. And, they invited people to the meeting—

THE COURT: What case do you have in point?

MR. MILLER: I think the *Gara* case says that violation—advocating violation of Selective Service law is unlawful. And, we can, in any event—

THE COURT: Before you were born, the Supreme Court of [61] the United States took up that issue and said, "No." That was the case that came from Oregon. That is the DeJonge case. That case says that a man is to be held for what is done at that particular time and not who calls the meeting. That is part of the First Amendment right.

MR. MILLER: In the *Gara* case, your Honor, there was a great deal of discussion about what the defendant had said on various occasions with respect to the matter, a letter he had written to the Selective Service describing—

THE COURT: The objection is sustained.

MR. MILLER: We would like to ask the question in an offer of proof.

THE COURT: You can do it at a later time or tomorrow morning early.

Q (By Mr. Miller) Mr. Tanner, no one representing the Lloyd Center told you that they personally would arrest you on that day, did they?

A Yes, that's correct.
MR. MILLER: I have no further questions.
MR. NEIL: Nothing further.
THE COURT: Call your next witness.

(Witness excused.)

MR. NEIL: Call Miss Roberts.

[62] SUSAN ROBERTS was thereupon produced as a witness in behalf of the plaintiffs, and having been first duly affirmed to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE CLERK: Will you state your full name and your address, please.
THE WITNESS: Susan Roberts.
THE CLERK: Your house address, please.
THE WITNESS: 2626 S.W. Water, Apartment No. 4.
THE CLERK: Thank you. Be seated.

DIRECT EXAMINATION

BY MR. NEIL:

Q Miss Roberts, you are one of the plaintiffs in this case?
A Yes, I am.
Q And, were you handing out the leaflets which is Plaintiff's Exhibit 1 at Lloyd Center on November 14, 1968?
A Yes, I was.
Q Where within Lloyd Center were you handing them out?
A Along the east mall down almost to the ice skating rink.
Q There is a reference in one of the security officer's deposition to a girl with a dog.

A I have a dog.

Q Was that you?

[63] A Yes.

Q Were you contacted by a Lloyd Center security guard on that day?

A Yes, I was.

Q And, what did he tell you?

A He came up to me and said I had to stop leafleting at Lloyd Center or I would be arrested?

THE COURT: Or you would be arrested?

THE WITNESS: Yes.

THE COURT: Who was that man?

THE WITNESS: I found out later he was a security guard. I thought he was a policeman.

MR. NEIL: I don't think she knows the name.

THE WITNESS: No, I am sorry, sir, I don't.

Q Now when told to do that, what did you do?

A Well, I left Lloyd Center. I didn't want to be arrested.

Q Before you left, did you have a conversation with any other official of Lloyd Center?

A Yes. I discussed the issue with Mr. Horn. He had come down. I don't know if the security guard called him. He came down and explained to me why I should be leaving Lloyd Center instead of leafleting.

Q Did he back up the security officer?

A Yes.

THE COURT: I don't know what "back up the security [64] officer" means.

Q Did Mr. Horn tell you also to cease distribution within Lloyd Center?

A Yes, he did.

Q To your recollection, did he say anything himself about arrest?

A No, I don't believe he did. He was explaining the reasons.

Q Did you see others distributing this leaflet at Lloyd Center on the day?

A Not in the mall; in the central area. When I left the center, I went out to the street and saw people there.

Q Was there any disturbance, blocking of traffic, disorder or anything of that sort?

THE COURT: I think it has been stipulated that there wasn't.

MR. NEIL: Nothing further.

CROSS-EXAMINATION

BY MR. MILLER:

Q Miss Roberts, after talking to Mr. Horn, you went out into the street and distributed your literature?

A Yes, I did.

Q How long did you stay there?

A Perhaps an hour.

Q People were passing by whom you could give the literature [65] to?

A A few.

Q Did you get rid of your handbills?

A I don't believe I did.

Q You testified in your deposition that you didn't know; is that right?

A I think that's what I said, yes.

THE COURT: She likes to distribute handbills when she is covered. It is nicer inside.

Q (By Mr. Miller) The place you were distributing them was covered, was it not, Miss Roberts?

THE COURT: I don't know whether that makes any difference really, whether she got rid of her handbills or not. How is that going to prove anything in this case?

Q (By Mr. Miller) What the police said to you with respect to arrest, Miss Roberts, was: If you did not

stop distributing literature at that location, he would call the police; is that correct?

A Well, no. He said he would arrest me—I would be arrested. He didn't say whom. According to my recollection, I would be arrested.

Q Page 27 of your deposition, were you asked this:

"Was there anything said about calling the police if you did not . . ." Starting on page 26:

"Q Miss Roberts, in your first conversation at the [66] Lloyd Center with the uniformed guard, as I understood your testimony, he ultimately said —asked you to leave the premises; is that correct?

A Yes.

Q Was there anything said about calling the police if you did not do so?

A Yes.

Q What did he say?

A We first discussed whether I would—would or would not stop—have to stop leafleting, and then he said that I would, in fact, have to leave or he would have to call the police."

Did you give that testimony when your deposition was taken on May 29, 1969?

A Yes.

Q Was it true?

A Yes, it was true.

THE COURT: She gave the testimony. There is no jury here. You don't have to ask those questions.

MR. MILLER: I have no further questions, your Honor.

REDIRECT EXAMINATION

BY MR. NEIL:

Q Did you believe, Miss Roberts, you would be arrested if you continued distributing literature within Lloyd Center?

A Yes, I did.

[67] THE COURT: What did you say?

MR. NEIL: I said did you believe, if you continued to distribute literature within Lloyd Center, you would be arrested?

A Yes, I believed that.

MR. NEIL: All right. Thank you.

Your Honor, my only other witness is the third plaintiff.

THE COURT: Is it stipulated that if the third plaintiff would testify, she would testify substantially in accordance with what the other two plaintiffs have said?

MR. BLACK: Is that all right?

MR. MILLER: The third witness didn't talk to Mr. Horn.

MR. NEIL: That is true. But the security guard said the same thing.

MR. MILLER: The third witness said in her testimony in deposition that she couldn't recall exactly what was said about arrest.

THE COURT: Is that right?

MR. NEIL: She said—Yes, I will have to admit that.

THE COURT: We will just not consider her testimony for anything other than the fact that the security guard asked her to stop leafleting; is that all right?

MR. MILLER: Yes we would stipulate to that.

MR. NEIL: We rest, your Honor.

[68] THE COURT: Call your first witness.

MR. MILLER: May I ask how long we will be in session? I have a first witness. I would like to make arrangements to get the others here.

THE COURT: We will go to 5:00 at least.

MR. HORN: Your Honor, may I say, I have to admit something here. I said a little while ago I never practiced law. I didn't consider I did, because I had to make a living, I did draw a few deeds.

THE COURT: That is all right. Weren't you in the insurance business for awhile also?

THE WITNESS: Real estate, your Honor.

THE COURT: Call your first witness.

MR. MILLER: Call Mr. VonHagen.

[69] RICHARD VonHAGEN was thereupon produced as a witness in behalf of the defendant, and having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE CLERK: State your full name and your address.

THE WITNESS: Richard R. VonHagen, Beverly Hills, California. Do you want my street?

THE COURT: We don't need it.

THE CLERK: Spell your last name.

THE WITNESS: V-o-n-H-A-G-E-N.

THE CLERK: Be seated, please.

THE COURT: You are a lawyer and what else?

THE WITNESS: I have been as one who is primarily responsible for our development in the City of Portland. I would like to make a brief statement, I think it is very pertinent. And, I am vitally concerned about the problem and I would like you to hear it. I will assure you I will be quite brief.

THE COURT: Go ahead.

THE WITNESS: We started planning for the Center approximately 1953. At the outset, it became very obvi-

ous that we could not build what was typically known as a shopping center. The reason for this was we were dealing with property that is not in an undeveloped suburbian area. Instead, we dealt with centrally located property that was already developed into 200 foot blocks —200 feet square with 50 foot streets.

[70] This fact dominated our thinking and resulted in the construction of an area that is quite different in two basic respects from what we commonly refer to as a normal shopping center.

The first one is that we could not hope to have one large area undivided by any public street because of these small blocks.

In fact, we had to plan a center which had within it a network of public streets and public sidewalks.

In fact, the City requested that we widen these streets so that we could have better vehicular traffic through the area and so we could build proper sidewalks around our improvement.

The second basic difference was that we could not rely on surface parking. The amount of parking we needed for this type of development was such that we felt that it was absolutely necessary to build structural parking. This was to bring the customers closer to the store and also to protect them from the weather and to protect them from the necessity of crossing streets going to and from the stores.

Now, let us analyze exactly what we did in view of these conditions.

First, we built two markets with parking. These two market buildings, both with parking, these markets were surrounded on three sides by public streets and public sidewalks.

[71] We built another building which was occupied by a bank, a drug store, and several shops. This building also is surrounded or adjacent to public streets.

We built a third building which is occupied by the Newberry Department Store with parking for it. This is adjacent to public streets and private sidewalks.

We built the large area and in order to facilitate and take care of the number of stores we had to have there, we did in fact vacate several streets in that area. We acquired those streets by purchasing them by an exchange and vacated them and built what essentially is one building.

MR. NEIL: I object, your Honor. I have heard the contention made before that they paid money for this vacated street.

There is in evidence here a series of ordinances where the streets were vacated for some 8.3 acres; there is an ordinance also that they granted some areas to the city, 74,000 square feet, one fifth of what they have got, to widen the street. I see nothing in it about them paying for the area vacated. And, I object to the testimony.

THE WITNESS: Your Honor, if he will read the exhibits, he will find we agreed in that exhibit to dedicate an equal amount of square footage for the streets that were vacated; that we did.

MR. NEIL: May I point out to the Court the ordinance which is part of the exhibits?

[72] THE COURT: I am going to let him testify without interruption. You may make your objection later. So far, I have not found anything relevant in this testimony.

Mr. VonHagen, you are a lawyer. Wasn't your father a lawyer? Is Ralph VonHagen your father?

THE WITNESS: Yes.

THE COURT: I know you are intimately acquainted with this particular property. I know that Lloyd Center has become a model for other places. I think Century City development was modeled after yours. If it wasn't, it looks very similar to it. But from the very start I

came in here and I looked at this problem, it seemed to me that there were certain issues that I must determine. It is not whether I like these boys that hand out this literature. Many of them don't like me. I know that. I am looking at them. I send them to jail. But that is not the proposition. The issue is: Whether a shopping center of the size and magnitude of yours can separate and distinguish between people who want to use those facilities, not for the purpose of the shopping center but for their own purpose, for instance, the Salvation Army—

THE WITNESS: Your Honor, I would hate to think by permitting the poppies to be sold at Christmastime, I would be committing my stockholders to a dedication of $34,000,000 worth of property to the public by doing that generous act.

THE COURT: You may hate to think so, but that is not [73] the proposition I have to determine. I have to decide as a matter of law. Maybe you should not have done it. But, the thing I have got to determine is, having taken certain steps, are you committed to permitting certain other things to be done.

THE WITNESS: Would you indulge me just three or four minutes?

THE COURT: Sure. As a lawyer, I thought we ought to talk about what I believe to be the issue in this case.

THE WITNESS: As a lawyer, I will make my say briefly and then finish.

THE COURT: Go ahead.

THE WITNESS: As I said, I felt this large block of property was again one building in which we put the parking underneath the stores and facilities on the roof for the delivery of the merchandise. This was done for the convenience of our prospective customers. And, we built the Sheraton Hotel and surrounding areas. It is surrounded by public streets. Today, we are finishing an

office building with parking structures. It has public streets, your Honor. We hope to continue to improve the City of Portland in a similar manner.

Now, it is my thought, and it is our corporation's thought, this is our private property. And, we are perfectly—we will agree that we have devoted it to retail purposes. But, we think we have the perfect right to say what activities that are connected with the business of that center and can or cannot [74] come upon our private property. That would apply to the Sheraton Hotel; that would apply to our office buildings; that would apply to the markets or anywhere else.

We have leased to each tenant, not only the interior of the building, we have leased the sidewalks, the escalators, the stairways, the parking lots. And, we maintain them. We are obligated to. We have to keep them clean. We also have to protect them. It is our duty to see that the environment there is such that the customers will come to trade with our tenants. We think we have a duty to protect that environment. That is what we have been trying to do for nine years.

THE COURT: I have no quarrel with your position in the sense that that is what you hope to do and propose to do. But the only issue before me is whether you have the right or privilege of stopping someone from passing out literature either on the central mall or in front of the interior buildings or in front of the Selective Service building, 811 N.E. Oregon. Those are the questions that bother me. I think there might be a distinction between the sidewalks in front of the interior buildings and the malls. But, I don't see how what you had in mind at the time you purchased this property is going to assist me in making the legal determination that I have to make. That is the point.

THE WITNESS: If I may beg to say, if you will read the *Logan Valley* case as I am sure you are going to, you

will see the point I have been trying to make. I think the case is ve y good [75] authority for my point—

THE COURT: It may very well be.

THE WITNESS: —unless these activities are directly connected with activities that are going on in the center, we, as private property owners, have the right to say who can come upon our property. If we can't, there is something wrong in this country. You can apply that to any store in the City of Portland. You can apply it to any se vice station, any parking lot. Those property owners have to protect their property. If it is an activity that is directly involved with what they are carrying on in their property, that is another matter. If it is something entirely foreign, I, as a property owner and developer, would certainly be surprised if I couldn't treat it as private property.

THE COURT: Well—

THE WITNESS: That is my point.

THE COURT: I don't know whether you are going to be surprised or not, Mr. VonHagen. In making this dete mination, I cannot take into consideration whether you are going to be surprised or not. I have got to follow those decisions which I regard—

THE WITNESS: Believe me, I didn't get up here to discuss the law. Our lawyers will do that adequately.

THE COURT: It may be that a business has a certain obligation to its tenant. It may be that more people would be [76] attracted if no controversial activity took place at Lloyd Center and if only Bobby Kennedy would come out there and make speeches you would get a lot more business or maybe Ronald Reagan, whom you like bette ; but, the thing is, that may not be the law. The law may be that anyone has a right to come there, I don't know if that is the case or not. I haven't looked at it. Yesterday was the first time I ever saw this case, and that was when I talked to Mr. Miller and Mr. Neil

and told them to decide on all the facts and they told me briefly what it was about. I thought then and I still think that this case involves primarily an issue of law and not of facts.

THE WITNESS: Mind you, we are not opposed to handbilling in the public areas of Lloyd Center. There are plenty of streets and sidewalks in Lloyd Center for them to do that. We have no objection whatsoever. And, I think it can be well done. As I say, I commend the *Logan Valley* case to you. I believe it supports our position very strongly.

THE COURT: I didn't want to cut you off. Is there anything else you wanted to say?

THE WITNESS: May I ask our lawyers?

THE COURT: Who is asking the questions, you, Mr. Black? Go ahead.

DIRECT EXAMINATION

BY MR. BLACK:

Q Do you know what I mean when I refer to customer [77] motivation?

A Yes, sir.

Q Would you tell the Court something about customer motivation and its relation to the manner in which the Lloyd Center is arranged and operated with particular reference to the malls in which the plaintiffs here were seeking to distribute literature.

A Well, it was our desire to create an atmosphere which would attract shoppers, which would please them and which would not disappoint them when they came there to do their shopping. If you can accomplish those things, you have achieved what you call customer motivation. We get them there and they are happy there and enjoy it. We keep them out of the rain. As we say,

it never rains in Lloyd Center. If it does rain, we keep them dry. We give them pretty flowers; we give them structures, fountains; we give them skating rink which they enjoy watching, we have done a lot to develop this custome motivation, to attract them.

Q Mr. VonHagen, could you tell the Court of anything which is there in connection with the malls that we are talking about at Lloyd Center which bears a similarity at all to a public street?

MR. NEIL: I am going to object to that as calling for a conclusion.

THE COURT: That is not for him to determine. That is [78] for me to determine, isn't it?

Q (By Mr. Black) The escalators that are in there, are they in the malls?

A Well, they lead from one level to the other. This center is multi level. In order to get from one place to another, you don't have a street to walk down. You have to go up the escalator or down it or the stairways. Actually, we have no public streets in front of the stores. It's a sidewalk with landscaping, with benches—

Q Take for instance, the eastern boundary of the center which is about 16th Street, I think, and the western boundary which is 9th Street, can you go through what's been referred to as the main building from 9th Street and get to 16th Street without changing levels?

A No, sir.

Q And, that is true vice versa; isn't it?

A Yes, sir.

Q The opposite direction?

A Yes.

Q If you want to go from the northern part of the center down towards the Sheraton Hotel, the southern part of the center, can you go through that way without changing levels?

A No, sir.

MR. NEIL: Well, your Honor, I am going to object to further testimony. Nobody is leafleting around the escalators. [79] We could concede their right to prohibit us from doing that. We don't deny they have a right to regulate it so we wouldn't obstruct traffic.

MR. BLACK: I would just want to say that I am not offering it for that point. I have already agreed with you that you weren't doing any obstructing. What I am seeking to show here, and, of course, the time can be shortened very greatly if Mr. Neil will simply admit this: And, that is, there is no similarity between this mall and a public street. That is what I want to show. If he will admit it, we will go home.

MR. NEIL: I will not admit that at all, your Honor.

MR. BLACK: That is what I am seeking to prove. If you won't admit it, then I will have to prove it.

THE COURT: I will tell you the same thing, there is no jury here. There is no use making that kind of argument. It leaves me cold. Go to something else. I don't go for that kind of foolishness. Ask your questions. There is no use of getting histrionic about a thing like that.

MR. BLACK: I wasn't trying to.

THE COURT: Go ahead.

Q (By Mr. Black) I think you probably left all, as far as the direct operation of the center to the manager, Mr. Horn, did you not, as far as the day-to-day operation?

A Yes, sir.

Q Yours has been more of a supervisory executive capacity; [80] is that correct?

A That is correct.

Q Insofar as you can recall, as the principal executive of that corporation, with regard to its operation there at the center, has the corporation ever taken any position pro or con with regard to these various causes that are the subject of handbilling in the country?

A No, sir, we have not.

Q It's handbilling generally that you are talking about; is that it?

A That is correct.

THE COURT: Mr. VonHagen, how do you say that in light of the questions I propounded before; if you say that the Townsmen's Club cannot meet at your place, but that the Young Republicans can, aren't you putting your seal of approval on some and and denying that seal to others? Aren't you actually saying to some people, "We will let you come there because we like the things that you do," like Mr. Horn has said. He likes the things that the Salvation Army has done because they are poor people and they do good work. Isn't the point that if you don't want to take a stand on the merits or demerits of an organization or a pamphleteer, you have to permit all pamphleteers unless they are immoral or illegal, to do the same thing.

THE WITNESS: What I meant to say, I am not opposed to handbilling if they do it in the proper place. As I say, there are [81] plenty of areas within our development for them to do their handbilling. We have objected to it on what we considered our private property.

THE COURT: Did you set aside certain places for them to do it?

THE WITNESS: No. But, there are—I would guess there are 30 or 40 blocks of public streets within Lloyd Center that they can do it on.

THE COURT: I thought you had set aside a certain place.

THE WITNESS: No, sir, they can contact the public very well from the public sidewalks within our development.

THE COURT: In other words, I own some property very close to you, you don't care if they do their pam-

pleteering on my property then, do you? That is what you are saying.

THE WITNESS: No, I don't care if they do it on public property. I would be opposed to them doing it on anybody's private property. I don't know what it leads to if they can distribute it anywhere. They can come there and make a speech. They could have an assembly. It would be chaos, frankly.

THE COURT: All right. It is your position that since this is private property and your corporation owns it, you can determine which organization may use it and which organization may not use it; is that correct?

THE WITNESS: Well, actually I haven't issued any such order from Los Angeles.

[82] THE COURT: I thought that was your position. Do you disagree with Mr. Horn's appraisal and the views that he expressed?

THE WITNESS: No, I don't disagree with Mr. Horn.

THE COURT: I am not trying to trap you or anything; I just want to know what your position is.

THE WITNESS: I think our position has been to exclude them. There have been a few exceptions made because we felt they were good for the center; they would bring people there and it was customer motivation.

In the case of the poppies and the Salvation Army, we were just being charitable. As I say, I would hate to think that would result in the conversion of private property into public property by doing such a favor as that to those organizations. That would not be my conception of what the law is. If it were, we would have excluded all such activity.

THE COURT: Any cross-examination?

MR. NEIL: None, your Honor.

THE COURT: That's all.

(Witness excused.)

Call your next witness.

MR. MILLER: I would like to call as part of the defendant's case, Mr. Tanner. I have one question I would like to ask him.

THE COURT: You can ask it from there if you have only one question.

[83]

DIRECT EXAMINATION OF MR. TANNER

BY MR. MILLER:

Q Mr. Tanner, in your deposition—

THE COURT: Ask him the questions you want to ask him. Then if he gives you the wrong answer, you can impeach him by the deposition.

Q (By Mr. Miller) Is it your belief, Mr. Tanner, that the passing out of the handbills that you were passing out on November 14th could properly be interpreted as advocating the violation of the draft law?

MR. NEIL: I object. The leaflet speaks for itself.

THE COURT: The objection is sustained.

MR. MILLER: I would like to have the question answered under an offer of proof.

THE COURT: You can do it a little later.

MR. MILLER: Thank you, your Honor.

THE COURT: Call your next witness.

MR. BLACK: Mr. Nudelman. If your Honor please, I have several witnesses that I have asked to come over. I would be glad to suggest what they would testify to, and maybe we could move the matter along.

THE COURT: I think that is a good idea.

MR. BLACK: This is one of them. I have also asked Mr. Leigh to come over. This is Mr. Nudelman who is here now.

THE COURT: Who?

[84] MR. BLACK: Mr. Nudelman.

THE COURT: I thought I knew all the Nudelmans. He is one I don't know. Go ahead. What is your first name?

MR. NUDELMAN: Burton.

THE COURT: All right.

MR. BLACK: These witnesses, I believe, would testify that the distribution of literature, that is handbilling, is detrimental to customer motivation at the Lloyd Center. In other words, it is detrimental to the business conducted at the center.

THE COURT: Any kind of handbills?

MR. BLACK: Yes; that it is detrimental. It is a question of degree with reference to the handbills and how much of it and things of that kind. This is detrimental.

MR. NEIL: If that is a statement of their opinion, I have no objection. I would stipulate they would so testify.

MR. BLACK: All right. That's all they would say.

THE COURT: Mr. Nudelman, what business are you in out there?

MR. NUDELMAN: Zukors.

THE COURT: All right.

MR. BLACK: It will be stipulated that that was the situation on November 14, 1968 as well.

THE COURT: That is his opinion.

MR. BLACK: They would give the opinion anyway.

MR. NEIL: Yes.

[85] THE COURT: Who is your next witness? You said you had two witnesses who would say that.

MR. BLACK: Yes, Mr. Leigh. He hasn't arrived yet.

THE COURT: Do you know what he is going to testify to?

MR. BLACK: The same thing as Mr. Nudelman.

THE COURT: What does Mr. Leigh do?

MR. BLACK: Mr. Leigh is the President of the Merchant Association of Lloyd Center. And, his occupation particularly over there is Manager of Nordstrom-Best.

THE COURT: All right. Is that stipulated to?

MR. NEIL: The same stipulation, your Honor.

MR. BLACK: Mr. Leigh, if your Honor please, will identify his signature at the bottom of the resolution of the Merchant's Association that I understand has been offered here as one of the exhibits, 59. It has been taken under consideration by your Honor.

MR. NEIL: I have no objection to the authenticity. I object to the relevancy of the document. That came after the events in question.

THE COURT: Mr. Nudelman, you are excused.

Call your next witness.

MR. MILLER: May I have just a moment, your Honor?

MR. BLACK: We have just two other witnesses.

THE COURT: Tell me what they are going to say. Maybe Mr. Neil will agree to what they would say.

[86] MR. BLACK: One is an employee, I take it, of the Graham Architectural firm in Seattle. He has, as I understand it, participated in the designing of a large number of shopping centers of this general type throughout this country and the world. We thought we would bring him for the purpose of showing the construction of the Lloyd Center and its application toward customer motivation. That is what we thought we would bring him for.

MR. NEIL: I will stipulate he would testify that the Lloyd Center was designed to stimulate customer motivation.

THE COURT: And it was designed for the purpose of getting as many people over to buy the commodities of

the people who have stores or service establishments at Lloyd Center.

MR. NEIL: I will be willing to so stipulate.

MR. MILLER: If your Honor please, the architect's name is Mr. Alvin Harrison. He planned to be here at 9:00 tomorrow morning. It was our intention that we would write out statements of his qualifications and his direct testimony and offer it in evidence. We have a preliminary statement from him as to the general nature of his testimony. But, it doesn't include—it doesn't include specific statements about Lloyd Center. And, it doesn't include his qualifications. And, we would be willing to offer that written statement and offer Mr. Harrison, the architect for cross-examination—.

MR. NEIL: I don't want to cross-examine him.

[87] MR. MILLER: —at 9:00 in the morning.

THE COURT: The case is going to be over this afternoon. So, you don't have to do that.

Mr. Miller, you seem to have a lapse of memory. Don't you know when you run out of witnesses you close your case in this court?

MR. MILLER: There had been a day and a half set for this case.

THE COURT: I wasn't bound by that.

MR. MILLER: I know that.

THE COURT: I told you yesterday again the cases have a tendency of moving faster in my court than most other places.

MR. BLACK: We have written statements from both the two witnesses who haven't arrived yet.

THE COURT: What are their names?

MR. MILLER: If your Honor please, there is one additional witness we had planned to call. His name is H. J. Sundt. He is an Assistant Manager of the Lloyd Center.

The purpose of calling him—

THE COURT: Is he here now? Is that your man that is coming in now?

MR. MILLER: No. He is not here right now. The purpose of calling Mr. Sundt was to have him testify to an incident that occurred at the time the complaint in this case was filed with regard—it was filed, I think, around the 13th of March and the [88] calls that he received from certain people about the incident.

I have Mr. Sundt's statement made to the officer of the Lloyd Center there dated the 14th of March, 1969. It was from various people who were threatening to beat up on various other people like these plaintiffs and things of that character.

The purpose of the offer was solely for the purpose of showing—to support our position that handbilling is controversial; that this particular handbilling did give rise to some matter of controversy.

THE COURT: You mean some people didn't like these plaintiffs and wanted to beat them up?

MR. BLACK: Yes, that's it.

MR. NEIL: Your Honor, he says this event occurred about the time the complaint was filed which was in March of 1969. I know of no such incident as that. I really can't understand that.

MR. BLACK: It goes back to this particular incident.

THE COURT: I will assume that if the witness was called he would testify as to those conversations he had with unknown people. But, I will take the matter of its admissibility under advisement.

MR. BLACK: May I submit the statement to Mr. Neil?

THE COURT: Yes. What is your next witness?

MR. BLACK: I think that's our case, your Honor.

MR. MILLER: If your Honor please, before we rest, we [89] have—I handed Mr. Neil a written statement that was prepared by Mr. Alvin Harrison, the architect. Mr. Neil has stated that we may put in into evidence.

THE COURT: I thought he was going to do that. It is stipulated that if Mr. Harrison were here he would testify in accordance with his statement that he presented.

MR. NEIL: So stipulated. I haven't yet read the other one yet.

THE COURT: Which one?

MR. NEIL: The one Mr. Black just mentioned.

THE COURT: This statement of what people told the Assistant Manager of Lloyd Center when the complaint was filed is a very dubious one as to its admissibility. I don't think, however, you have to put any testimony on to show that the passing out of literature or handbills opposing the American participation in the Vietnam war or the draft is a controversial matter. I know it to be controversial. So, if that is the purpose of your offering that piece of evidence, I think you are just wasting your time because I know that.

MR. BLACK: That is the purpose, if I could have the record show it.

MR. NEIL: This memorandum, your Honor, as I thought Mr. Black stated, deals with a telephone call to Mr. Sundt on March 13, 1969.

THE COURT: I know that. Do you have any objection to [90] my taking judicial knowledge of the fact that pamphlets on behalf of the Resistance movement or urging people not to participate in the draft or support the Vietnam war is a controversial matter?

MR. NEIL: No. You may take judicial notice of that.

THE COURT: All right.

MR. NEIL: I do object to the document going in.

THE COURT: He doesn't want it now.

MR. MILLER: Could we have one other little matter, your Honor?

THE COURT: Yes, go ahead.

MR. MILLER: Mr. Harrison, whose written statement has been received in evidence, has advised me that

the design principles that he describes there for shopping centers were applied in the design of Lloyd Center. I would ask counsel to so stipulate.

MR. NEIL: So stipulated.

THE COURT: I will take judicial notice that shopping centers are designed in general and the one in Lloyd's addition in particular to attract as many people as possible and make it most pleasant for them to shop and spend money.

MR. MILLER: I would like to call again Mr. Horn as part of our case and ask him some questions.

THE COURT: All right, Mr. Horn.

[91] RICHARD C. HORN was thereupon produced as a witness in behalf of the defendant, and having been previously sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MILLER:

Q Mr. Horn, has handbilling of any kind ever been —excuse me—I will rephrase the question.

Has Lloyd Corporation ever given permission to anyone to handbill in Lloyd Center?

A No, sir.

Q Does Lloyd Corporation discriminate in the rental of its auditorium to any group or persons?

A No, sir.

Q It does not discriminate?

A No, sir.

Q If the plaintiffs' group was going to carry on lawful activity in your auditorium, would you rent it to them?

A Yes, sir.

THE COURT: Would you have rented it to them to carry on a Resistance program?

THE WITNESS: I want to think about that, your Honor, because our rule on the auditorium is that we would not rent it to anyone advocating the overthrow of the United States Government. And, I never have gone into that point whether it also [92] advocated the breaking of the laws of the United States. I would be inclined to say we would not want to rent it for that purpose whether it said any other law of the United States.

Q If their resistance and opposition to the war in Vietnam and to the draft laws of this country was to be carried on in a lawful manner, you would have no objection?

A No.

Q You would have no objection to renting the place?

A We would be renting it to anyone.

THE COURT: Even though they were opposed by most of the merchants; and even though the ideas they expressed were opposed to Meier and Frank's and J.C. Penney's and Woolworth's and Newberry's, that wouldn't make any difference?

THE WITNESS: No, sir. Your Honor, we—no merchant controls the operation of Lloyd Center or its policies as far as control.

THE COURT: I didn't hear what you said.

THE WITNESS: No merchant or group of merchants control Lloyd Center as to what we feel should be done. It's our property. We have had one of our doctors over there complain mightily because we rented the auditorium to some group he felt was subversive. We say unless we know it is, the instructions to our people is that they are to rent it to anyone unless we know for a fact and it's checked up and I get word, I refer it to the FBI whether it is that kind of group.

[93] THE COURT: You check with the FBI on people who apply to rent the auditorium?

THE WITNESS: No, your Honor, unless they have some strange things. We do have a list that is put out by the FBI of known organizations. I don't know of them operating in Portland for one thing. But, if there was some strange name we don't know, we would look it up, yes, sir.

THE COURT: Anything further?

THE WITNESS: Even then, your Honor, we take a chance on those unless it was just definite word.

Q (By Mr. Miller) If the plaintiffs wanted to handbill within the auditorium, you would have no objection to that?

A No, no. That is done in the auditorium.

THE COURT: Anything further?

MR. MILLER: Nothing further.

MR. NEIL: I have nothing further.

THE COURT: You wanted to ask some questions and get some answers from Mr. Tanner. I will let you do that.

Mr. Tanner, do you think you were advocating the overthrow of the Government or anything illegal when you were passing out these leaflets?

MR. TANNER: No, I don't think I was.

THE COURT: Did you think it could be so interpreted?

MR. TANNER: Possibly, yes.

THE COURT: You think it is possible to interpret it that [94] way. I asked the questions for you. Now, you have the answer.

What else have you got?

MR. MILLER: As an offer of proof, your Honor, we would like to ask counsel to agree that at the meeting that was held at Centenary Wilbur Church that was be-

ing advertised by the leaflets in this case, there were draft cards that were turned in by people who came there and they did that for the purpose of disposing of their draft cards.

THE COURT: How many draft cards?

MR. MILLER: In the deposition, your Honor, they stated draft cards were turned in. The witnesses did not say how many were turned in.

I would also like to demonstrate when the draft cards were turned in, they were sent back to the Draft Board involved. That was the purpose of having them turned in.

THE COURT: Have you got any of the people from the Draft Board to testify as to how many cards they received, if any?

MR. MILLER: No, we don't, just the plaintiff's testimony.

THE COURT: The reason I asked you this, I think I know a little about this particular activity. We have found when there are as many as 200 so-called draft cards dropped into a bag, when they are checked by the FBI and others, it is found there are not more than four or five. They are usually laundry tickets and driver's licenses and all the other things. Of the five or six [95] that are dropped in the bag that are authentic, most of the people whose names are on the cards call up the Draft Board or FBI and tell them they have lost their cards. So, I don't know whether these people really throw in draft cards. I have my idea that the reason why these so-called leaders don't put in their draft cards, but put in their driver's license, they want to continue to be leaders.

MR. MILLER: I don't blame them.

MR. NEIL: Well, your Honor, we object to this as irrelevant. The leaflet itself is the measure of whether it is a violation.

THE COURT: I am going to reject the offer of proof.

MR. MILLER: Could we offer as part of the offer of proof the deposition of Donald Tanner?

THE COURT: All right.

MR. NEIL: I object to it for the same reason. In the deposition, I allowed them to go into this. I don't think it is admissible either.

THE COURT: What else do you have?

MR. BLACK: That's all, your Honor, evidentiary-wise. I would like to make a statement about the nature of our case though.

THE COURT: All right. Are you going to submit the case today?

MR. MILLER: I submitted a 25-page brief.

[96] THE COURT: I will take a look at it. You are not going to submit anything more?

MR. BLACK: I am not going to submit anything more.

I would be glad to talk a moment or two and then just submit the brief.

MR. NEIL: We also would want to send up a supplemental brief. We have sent in a trial brief. My brief was handed to your secretary 1:30 yesterday.

* * * *

[113] MR. MILLER: If your Honor please, with apology, I would like to ask—would like to ask counsel to agree to one more matter of evidence.

THE COURT: Go ahead.

MR. MILLER: That is, if Mr. Horn was called to testify, he would state that at the entrances to Lloyd [114] Center, there are placards which contain the following language:

> "Notice areas in Lloyd Center used by the public are not public ways, but are for the use of Lloyd Center tenants and the public transacting business

with them. Permission to use that area may be revoked at any time, Lloyd Corporation, Ltd."

MR. NEIL: I think it is irrelevant. I won't stipulate to it, your Honor, because I have heard this contention for a long time. I have been over there looking for them. I can't find them. So, I am not willing to stipulate to that.

THE COURT: Let Mr. Horn testify to it.

Where are those located, Mr. Horn?

MR. HORN: In the entrances, your Honor, to the center. They are embedded in the concrete and in the cement. There are plaques about this size in the metal (indicating) embedded in the entrances.

THE COURT: Where is the entrance?

MR. HORN: Well, you would find it between Goldberg's and the stairways.

THE COURT: Where?

THE WITNESS: One entrance would be the entrance by Goldberg's.

THE COURT: I know that. I eat there a lot. I have [115] never seen them.

THE WITNESS: It's across the street from Halsey —if you had crossed at Halsey, you would have seen it before you came in. They are supposed to be there. I didn't check. I haven't checked for a long time if they are all there yet. They were all placed at all of the entrances. I think they are all there.

THE COURT: I assume there are some in those places.

Do you admit that the sidewalks are places of public accommodation and handbilling may be distributed on the sidewalks?

MR. BLACK: Public sidewalks, yes.

THE COURT: That is between the two sections of Lloyd Center?

MR. BLACK: Across the street.

THE COURT: Across from Payless Drug Company?

THE WITNESS: Yes.

MR. BLACK: One is Halsey and the other one is Weidler that transfers the streets in an easterly-westerly direction. Then there are several other streets. It's set forth by the way in the pretrial order. It is admitted. In other words, the center includes the private property that Mr. Neil has been talking about.

THE COURT: Has there been any picketing in the [116] mall itself, Mr. Horn, in the main portion?

MR. HORN: Yes, your Honor. There were a couple before the Supreme Court Logan Valley case, there were a couple then. But, then they didn't stay but for a little while. But, about a month ago, there was one union objecting to Meier and Frank selling a certain pair of pants. So, they picketed in front of the Meier and Frank store and down below on Multnomah Street. They were picketing and we asked them if they would not picket and obstruct the doorway. We preferred if they would picket outside. We did not tell them they could not do it in the first place.

THE COURT: That was the ILGWU?

THE WITNESS: The Garment Workers Union from somewhere. I don't know if it was even in Portland. I think it was from San Francisco. In any event, they picketed. They did it only for a few minutes and then left. We did not interfere.

MR. BLACK: That was with regard to merchandise being sold at one of the stores?

MR. HORN: Meier and Frank, yes.

THE COURT: I know there was a picket line for several years in front of Payless Drug Store, wasn't there?

MR. HORN: Yes, your Honor. It was because the drug store people weren't union.

THE COURT: I am not interested in that.

[117] MR. HORN: Yes, they were there a couple of months in front of Pay 'N Save Drug.

MR. BLACK: Pay 'N Save, it is?

MR. HORN: Pay 'N Save; you know it's next to the First National Bank. They picketed on the sidewalk. They finally left. We didn't have anything to do with it.

THE COURT: The case is submitted. The defendant will go forward and put in its brief because the plaintiffs, as I understand it, waives its first brief.

MR. NEIL: We will stand on the brief we have already submitted.

THE COURT: You are not under any obligation to submit a brief. If you want to submit it, do it within the next two weeks. Then if you submit a brief, Mr. Neil will have one week within which to answer it. If you don't submit a brief, Mr. Neil is foreclosed from filing anything further. Is that all right?

MR. NEIL: Yes, sir.

THE COURT: The case is submitted. All witnesses are excused.

* * * * *

[118]

REPORTER'S CERTIFICATE

I, the undersigned, Jerry C. Harris, Official Court Reporter of the United States District Court, for the District of Oregon, do hereby certify that on the date set forth on the title page of this transcript, I reported in stenotype the proceedings occurred in the transcript appended hereto; that I thereafter caused my stenotype notes to be reduced to typewriting under my direction, and that the foregoing transcript consisting of pages 2 to 117, both inclusive, constitutes a full, true and accu-

rate transcript of said proceedings so reported by me on said date as aforesaid.

Dated at Portland, Oregon, this 9th day of February, 1970.

/s/ Jerry C. Harris
JERRY C. HARRIS
Official Court Reporter

PLAINTIFFS' EXHIBIT NO. 1

14 November 1968 * 14 November 1968

What Is The Resistance?

Guns and bombs cause death, fear and anger, which create more guns and bombs. Guns and bombs do not kill "communism" nor "nationalism"; guns and bombs kill people. There must be another way to protect democracy . . . or we will find no "protection", only the destruction of man.

The Resistance is people enough concerned about the guns and bombs of war (Vietnam, Guatemala, Laos) to deal with the problem actively. The Resistance is the young man who refuses to cooperate with the Selective Service, a tool of killing in a fashion only a little more politely than a gunman gone wild on the streets. The Resistance is people who refuse their taxes (82% for war in '68). The Resistance is you and me, aiding and abetting these people, all people to live in brotherhood and peace.

14 November 1968 * 14 November 1968

What is this day?

Today we talk about the draft, which means we are also talking about war . . . though we would rather talk about peace . . . and about our country's killing of people around the world . . . though we would rather our country fed them.

And as we talk, so we must act:

COME JOIN US TODAY! LEAVE YOUR SCHOOLS, LEAVE YOUR JOBS, BRING YOUR CHILDREN FROM YOUR HOMES!

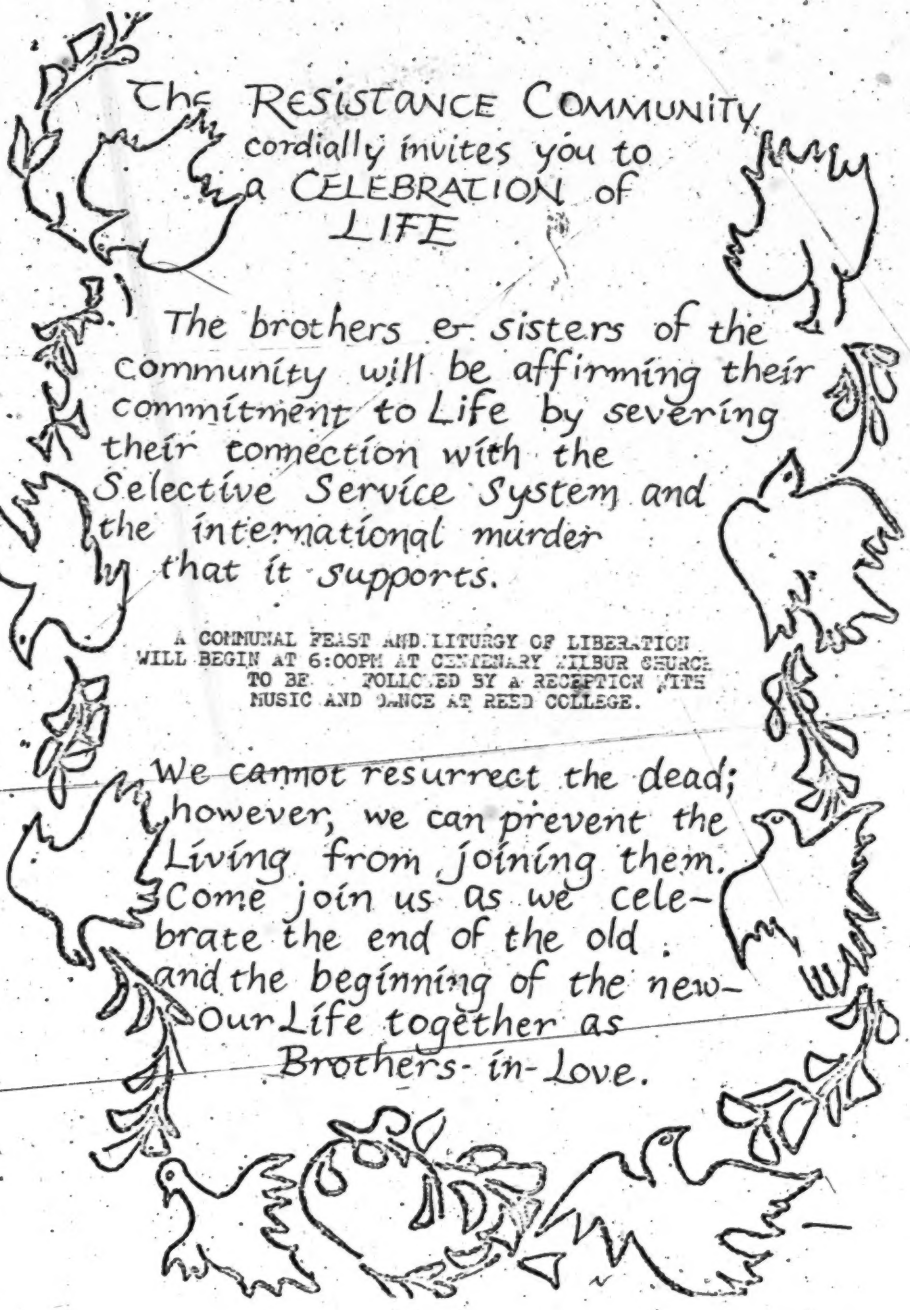
Join us! in talking to all our neighbors, to everyone passing in the streets.

And come to a life celebration and communion this evening, a time to break bread, share wine and the kiss of peace.

14 November 1968
Centenary Wilbur Church
215 SE 9th
Portland
at
6:00 p.m.

14 November 1968 * 14 November 1968

Thou Shalt Not Kill
. . . not any one . . .



The RESISTANCE COMMUNITY
cordially invites you to
a CELEBRATION of
LIFE

The brothers & sisters of the community will be affirming their commitment to Life by severing their connection with the Selective Service System and the international murder that it supports.

A COMMUNAL FEAST AND LITURGY OF LIBERATION WILL BEGIN AT 6:00PM AT CENTENARY WILBUR CHURCH TO BE FOLLOWED BY A RECEPTION WITH MUSIC AND DANCE AT REED COLLEGE.

We cannot resurrect the dead; however, we can prevent the Living from joining them. Come join us as we celebrate the end of the old and the beginning of the new- Our Life together as Brothers-in-Love.

PLAINTIFFS' EXHIBIT NO. 2

LIFE CELEBRATION

10 AM PART ONE NEIGHBORHOOD INVITATIONAL LEAFLETTING

3 PM PART TWO DRAFT BOARD CONVERSATIONS

6 PM PART THREE POT LUCK DINNER at Centenary Wilbur Church

7:30 PART FOUR COMMUNION at Centenary Wilbur Church

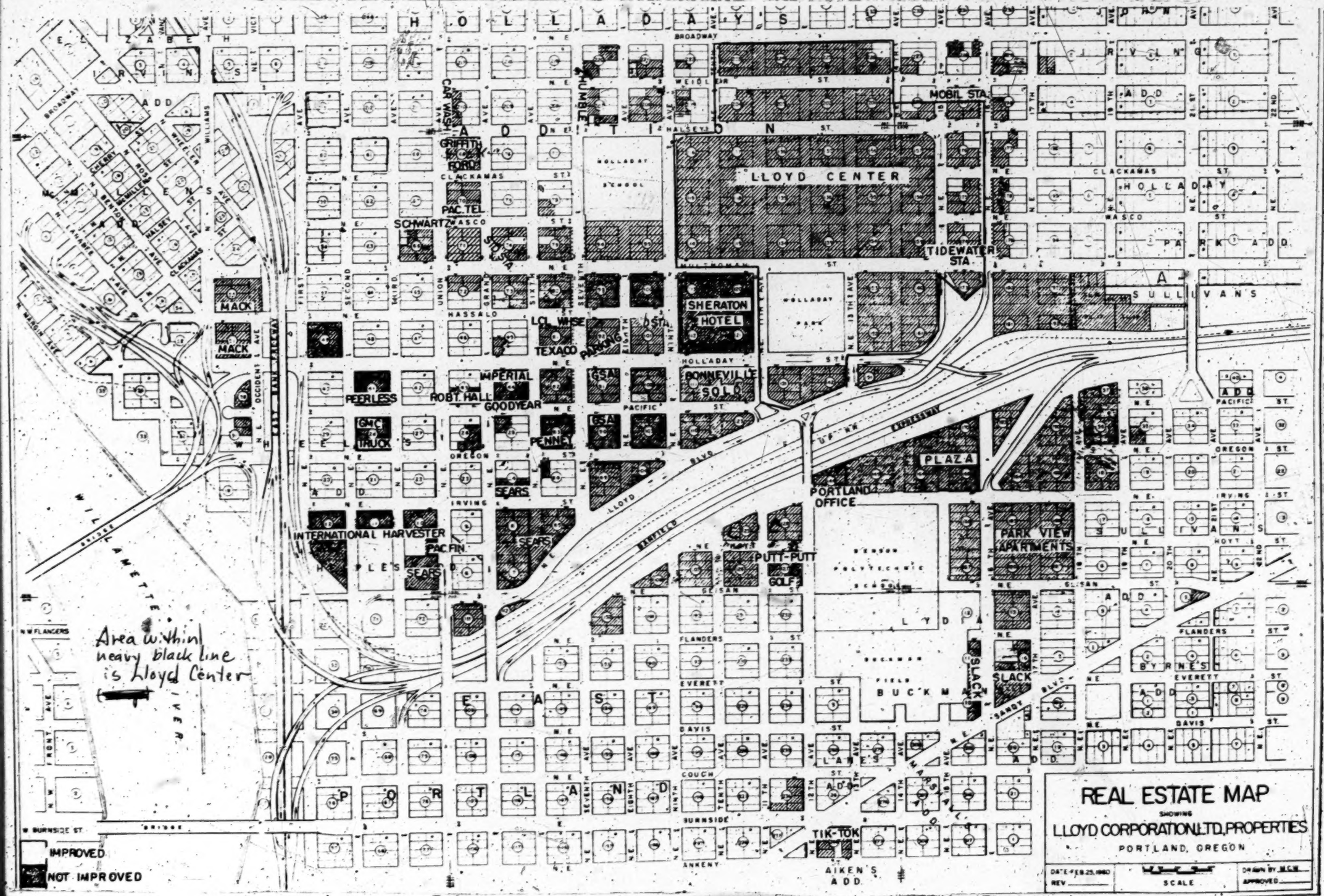
9 PM PART FIVE DANCE OF LIFE AT REED

Pltf Exhibit #2
Case Civ 69-427
Pptr
Date Clerk

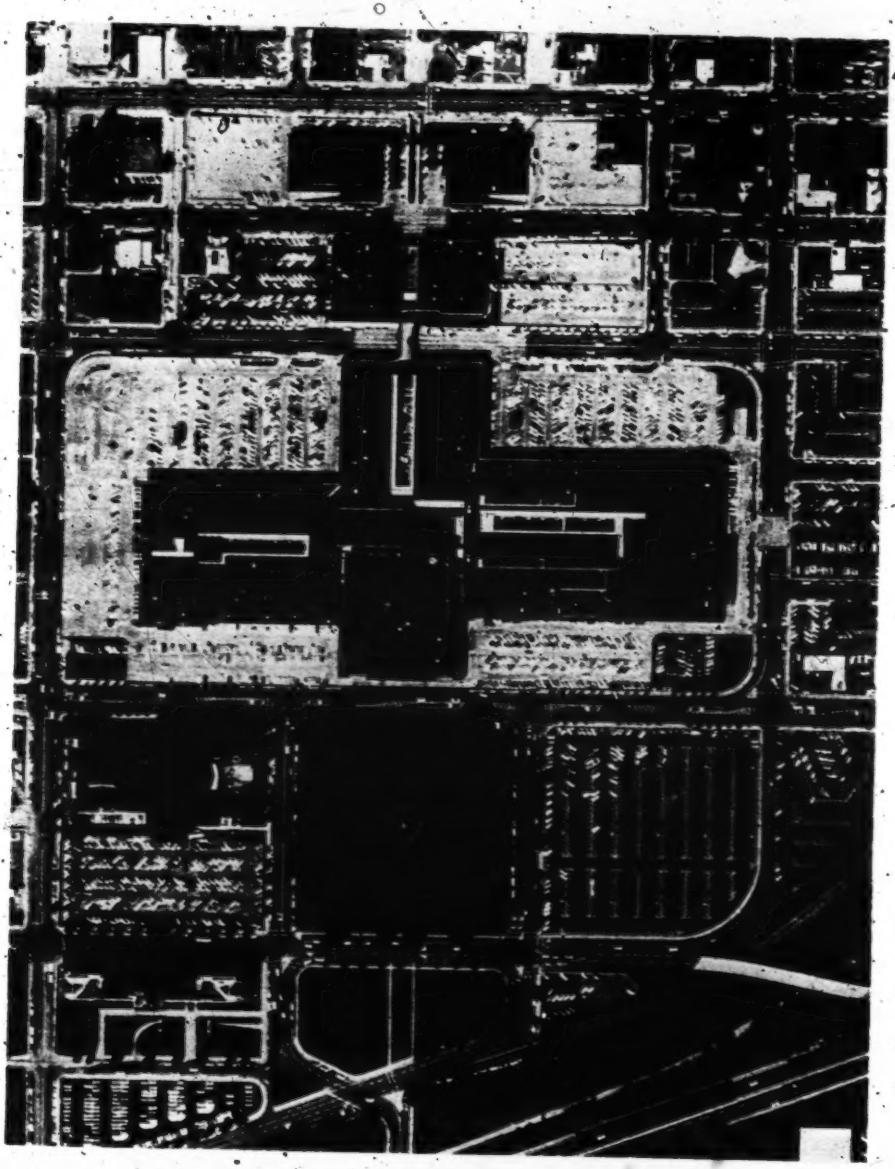
The Resistance
215 S.E. 9th
Portland
232-5946

282-2511

PLAINTIFFS' EXHIBIT NO. 3



PLAINTIFFS' EXHIBIT NO. 4



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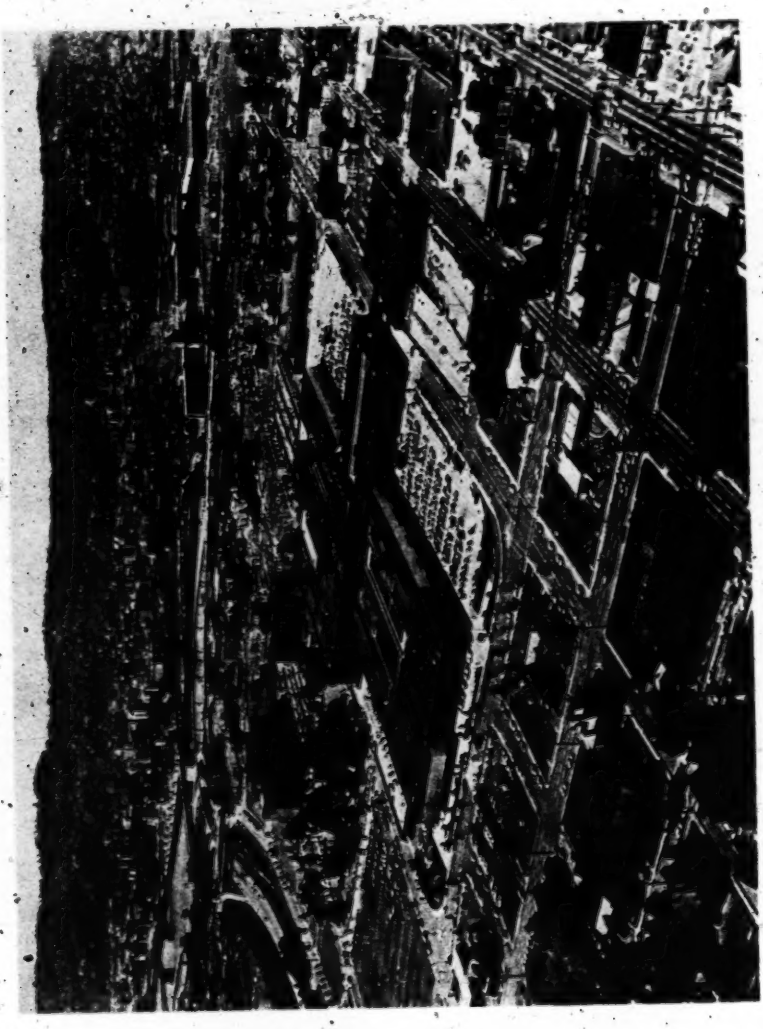


PLAINTIFFS' EXHIBIT NO. 6

November 26, 1968

Chief Donald McNamara
Central Precinct
209 S. W. Oak Street
Portland, Oregon

Dear Sir:

We would appreciate it if you would process Kenneth P. Boone for a special Police Officers Commission to be used ONLY on the property of the Lloyd Corporation, Ltd., to wit: Lloyd Center which covers the area from N. E. Ninth Avenue to N. E. 16th Avenue and from N. E. Broadway south to Sullivans Gulch, Portland.

It is understood that the Police Bureau of Portland will not accept any responsibility for the actions of our employees.

Special Commission and Badge Number _____ issued to Kenneth P. Boone is to be returned to the Portland City Chief of Police on the date the Commission expires for renewal or to be returned at such time his position terminates with Lloyd Corporation, Ltd.

Yours very truly,

Clifford P. Boss
Lloyd Center Special Police

I, Kenneth P. Boone, agree to release said Commission and Badge Number _____ to the Portland City Chief of Police Office at such time as my Commission expires or my employment has been terminated with Lloyd Corporation, Ltd.

_____

PLAINTIFFS' EXHIBIT NO. 7

Form 5-208 Rt. Thumb

CITY OF PORTLAND, OREGON
Department of Public Safety [Print]
Bureau of Police

This Certifies That Clifford P. Boss Is a Duly Commissioned SPECIAL POLICE OFFICER of This City and Is Invested With Full Police Authority.

Witness My Hand This 23rd Day of April 1969
This Commission Expires One Year From Date

/s/ Clifford P. Boss
Signature of Officer

/s/ Donald S. McNamara
Chief of Police

RESTRICTIONS None

AFFILIATED WITH Lloyd Center

HOME ADDRESS 4829 S E Gladstone

PLAINTIFFS' EXHIBIT NO. 8

COPY COPY COPY

MEMO

February 7, 1962

TO: H. J. Sundt
Bert Smith
Captain Boss
Head Office—Los Angeles

In some instances we perhaps have not implicitly covered the matter of arrest.

If a felony has been committed in the presence of the officer, or the officer has every reason to believe that a suspect participated in a felony, arrest is proper.

If a misdemeanor is committed in the *presence* of the officer (he must see it), arrest is proper.

We have other instances wherein there is no felony and no misdemeanor (misdemeanor includes disturbing the peace such as fights and riots), but there is an activity we do not wish to have carried on in the Center and, because the Center is private property, the activity is a trespass. These are the instances wherein individuals pass out cards and handbills, distribute samples, solicit; parade with a sandwich board and, as could happen, parades in front of the auditorium by objectors to a meeting being conducted.

In these instances we should, as we have done in the past, tell them we do not permit this and ask them to leave. This should be done politely but at the same time so firmly that they could feel they might be arrested. If they do not leave, you should say, "Sir (or Madam) you

are trespassing on private property. May I have your name and address?" Then, inform them that if they do not leave a warrant will be issued for their arrest. If they will not give their names, inform them that "we will ask that a John Doe warrant be issued for your arrest."

Whenever possible in arrest cases, call the City police —and definitely do so whenever it appears necessary because of the number of people involved or the seriousness of the commotion being raised.

RICHARD C. HORN

RCH:ab

PLAINTIFFS' EXHIBIT NO. 9

December 8, 1964

TO LLOYD CENTER SECURITY OFFICERS:

RE: *Handling of Offenses at the Center*

The following is with respect to the performance of your duties at Lloyd Center. Needless to say, you should in every instance be courteous and avoid use of abusive language. Also you should avoid use of physical force, or threats of it, unless necessary to prevent injury to person or property and then only such force as is reasonably necessary under the circumstances.

A full written report of facts relating to offenses occurring during your tour of duty should be made to the Lloyd Center Office on the same day in which the incident occurs.

Listed below are some of the offenses with which you may have to deal.

SHOPLIFTING

Shoplifting is the theft of merchandise from a retail store by a person posing as a customer, during the time the store is open for business.

Upon receiving a complaint, see that regular City police are summoned immediately and avoid making an arrest yourself, if possible. Rather, attempt to detain and interrogate the suspected shoplifter in a reasonable manner until the regular City police arrive. Be courteous but firm. Avoid use of physical force, if possible. Turn matter over to regular police upon their arrival.

If necessary to avoid escape of shoplifter, you may make arrest if following conditions are met:

You should *not* arrest unless:

(1) The thief is outside of the store with the stolen merchandise; and

(2) The store manager or other responsible employee agrees to file a written complaint with police.

You should:

(1) Join with the complainant in placing identifying marks on the stolen property and instruct the complainant to preserve the evidence.

(2) Try to get an admission from the person arrested or some type of statement. Write this down, using "quotes", and file with Lloyd Center Office. Have person arrested sign statement if it appears feasible.

(3) Turn over person arrested to regular City police upon their arrival.

(4) Follow up to make sure that a proper complaint is filed with the police by the complaining merchant.

DRUNKENNESS

Do not interfere unless drunk is annoying Center patrons or otherwise disturbing the peace.

If you feel that the drunken person's condition is such that he is a danger to himself and others, you should summon City police and keep him under surveillance until they arrive. Then turn the matter over to them.

If, on the other hand, he appears harmless but nevertheless is sufficiently inebriated to be a nuisance or a disgrace to the Center, you should firmly but politely ask the drunk to leave the Center. You may lead him from the premises, but do not do so forcibly.

DISORDERLY CONDUCT

In the event that there are any fights, riots, or other actions disturbing the peace, your attitude should be one of settling the matter, and arrest should be avoided if possible. In such a situation use only such force as is necessary to prevent harm to person or property, and immediately summon the regular City police.

VANDALISM

You should, of course, exereise reasonable force to prevent damage being done to property in your presence. Regardless of whether the incident occurs in your presence, gather all pertinent facts. Obtain names, and addresses, of witnesses and, if possible, written statements from them. Get names and addresses of offenders, if you can do so. Summon the regular City police and report the matter to them.

TRESPASSERS

This includes persons whose conduct is such as to be offensive to patrons of the Center. For example, individuals passing out cards or handbills, distributing samples, soliciting, parading with a sandwich board, or picketing of the auditorium by persons objecting to a meeting being conducted would fall into this category. Another example is skaters who have not paid their admission fee.

In these instances, tell the offender politely but firmly that this is not permitted and ask him to leave. If he continues the offending activity, inform him that he is trespassing on private property and ask for his name and address. You may inform him that a warrant will be issued for his arrest if he does not leave. If they will not give their name and address, inform them that if they do not leave "we will ask that a John Doe warrant be issued for your arrest".

You may lead the offender from the premises, but do not do so forcibly.

Summon regular City police if difficulties are encountered. Do not make an arrest yourself unless necessary to protect persons or property from harm.

Try to avoid controversy and raise as little commotion as possible.

RIGHARD HORN

PLAINTIFFS' EXHIBIT NO. 10

Aud. 99-175-120
4-65 2M

OFFICE OF
AUDITOR OF THE CITY OF PORTLAND
PORTLAND, OREGON 97204

Room 202
City Hall

COPY CERTIFICATE

STATE OF OREGON,)
County of Multnomah,) ss
CITY OF PORTLAND,)

I; RAY SMITH, Auditor of the City of Portland, do hereby certify that I have compared the following copy of Section 16-613, TRESPASS, of Ordinance No. 76339, passed by the Council December 4, 1941, as in force and effect from December 19, 1963 to date of certification, with the original thereof, and that the same is a full, true and correct copy of such original SECTION 16-613, POLICE CODE and of the whole thereof as the same appears on file and of record in my office, and in my care and custody.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of the City of Portland affixed this 6th day of November, 1969.

/s/ Ray Smith
Auditor of the
City of Portland

By /s/ Edna M. Cervera
Deputy

[SEAL]

Section 16-612. SALE OF CERTAIN FLASHLIGHTS PROHIBITED.

(Section 16-612 repealed by Ordinance No. 128270 passed December 19, 1968, effective January 20, 1969.)

Section 16-613. TRESPASS.

(New Section substituted for previous Section 16-613 by Ordinance No. 117794 passed and effective December 19, 1963.)

(a) It is unlawful for any person other than an officer on lawful business wilfully to trespass upon or damage any real or personal property of another.

(b) It shall be deemed a trespass under this section to enter or be upon any enclosed real property without the consent, express or implied, of the owner or lawful occupant of the real property.

(c) It shall be deemed a trespass under this section to enter or be upon any real property not enclosed when upon oral, written or printed notice of the owner or lawful occupant of the real property, the person entering or being thereon fails or refuses to depart therefrom immediately and remain away until permitted to return.

(d) Printed or written notices bearing the name of the owner or lawful occupant of the real property, posted by his authority in three conspicuous places upon the real property, and requiring all persons to forbear trespassing on the real property and to depart therefrom, is sufficient prima facie evidence of notice mentioned in subsection (c) of this section. (ORS 164.460 (2)).

(e) As used in this section, "owner or lawful occupant" includes an employee or agent who is authorized by the owner or lawful occupant to exercise control of the real property.

(f) As used in this section, an area is "enclosed" if it is not then made available by the owner or lawful occupant of the real property for entry or use by the public and it is

(1) Within a building or structure, or part thereof, or

(2) Surrounded by a wall, fence, bars, gate, hedge, chain, rope, barricade, or similar obstacle, or any combination thereof.

(g) For the purpose of this section, an area is not enclosed, though it is within a building or structure, or part thereof, unless it is included in the meaning of "enclosed" as defined in subsection (f) of this section.

PLAINTIFFS' EXHIBIT NO. 11A-V

A. Looking westward on N.E. Multnomah Street

B. Entrance to interior lower level parking from N.E. Multnomah Street

C. Upper level parking area, on south side of Halsey and east side of 9th Avenue, looking eastward taken from NW corner of the central complex

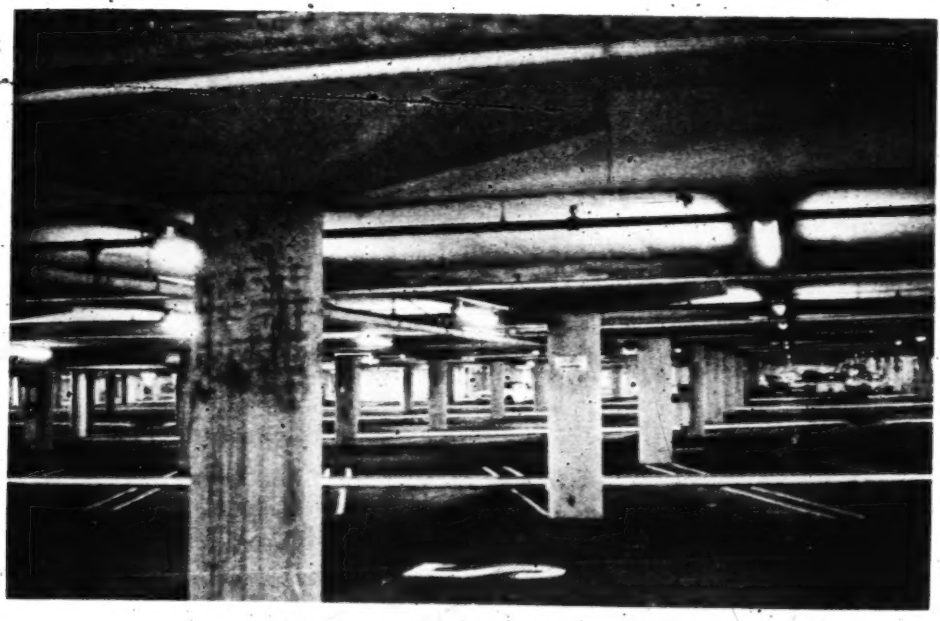
D. Same parking area as C, looking west from auto entrance from Halsey Street

E. Upper level parking area on south side of Halsey and west side of N.E. 15th, looking SE across Halsey Street

F. Same parking area as E, looking west toward North Mall shops

G. Looking east at crosswalk and overpass over N.E. Halsey

H. Looking south on crosswalk over N.E. Halsey



I. Lower level interior parking

J. Lower level interior parking

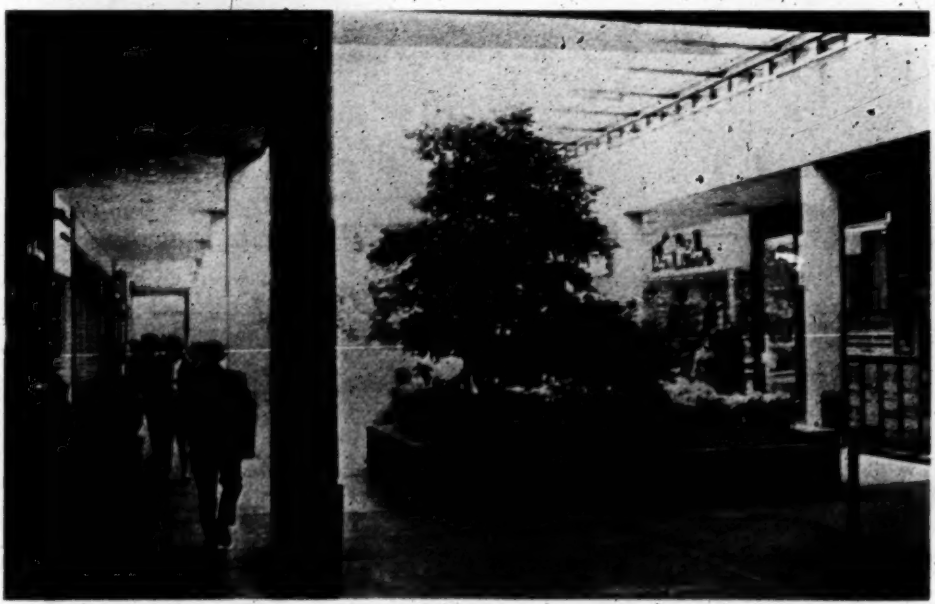
K. Ice rink, looking SW from main level bridge

L. Looking south from upper level across bridge over ice rink toward M & F entrance

M. Closer view of same M & F entrance shown in L

N. Bridge over ice rink, looking toward North Mall

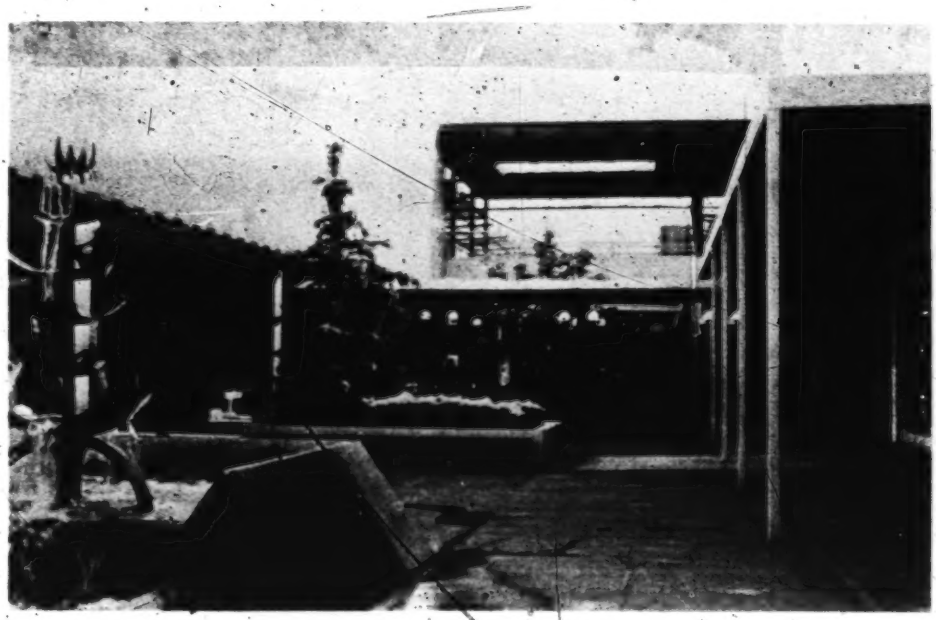
O. Mall above west end of ice rink looking north toward access to parking area shown in C and D



P. Looking north on North Mall from Central Mall

Q. Central Mall looking NE from east of ice rink

R. East Mall



S. West Mall looking eastward

T. West Mall looking eastward toward Central Mall from upper level

U. East Mall looking westward toward Central Mall from upper level

V. East Mall looking eastward

PLAINTIFFS' EXHIBIT NO. 12

11-14-68

Mr. Horn:

At 12:45 p.m. Ford accomined one of these subject's passing out pamplets to the L. C. Main Office.

I asked him for his name and he refused. I told him we may have to get a "John Doe" warrant for his Arrest —if necessary.

He wanted to talk to you as he was informed that you had granted their permission in the Center.

He agreeded to stay on the sidewalk until 1:30 p.m. and come back here at your office to see you.

/s/ C. P. B.

PLAINTIFFS' EXHIBIT NO. 14

[1]

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Civil No. 69-127

DONALD M. TANNER, BETSY WHEELER and SUSAN ROBERTS,
Plaintiffs,

vs.

LLOYD CORPORATION, LTD.,
Defendant.

DEPOSITION OF CLIFFORD P. BOSS
Taken in behalf of plaintiffs

* * * *

[3]

CLIFFORD P. BOSS

was thereupon produced as a witness in behalf of plaintiffs and, having been first duly sworn by the Notary, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NEIL:

Q Captain, I think you understand that I am the attorney for the plaintiffs—

A Yes, sir.

Q —two of whom are sitting here?

A Yes, sir.

Q And I am going to ask you some questions. If you

don't understand my question, please feel free to ask me to clarify it. The ideal here is that I understand what you are saying and you understand what I am asking.

Q What is your occupation, Captain?

A I am a captain in charge of security police at Lloyd Center.

Q And you are employed by the Lloyd Corporation, are you not?

A Yes, sir.

Q How long have you been in that position?

A Since April the 1st, 1960.

Q And I notice you are wearing a uniform here today. Is that the normal uniform you wear on the job?

[4] A Yes, sir.

Q Is that uniform different in any respect than the City police uniform?

A Yes, sir.

Q In what respect is it different?

A We have "Special Police" on the shoulder; we have—

Q Would the word "Portland" appear underneath it; is that correct?

A Right. Then we have a silver badge where the City is gold. The buttons on our uniform are all silver where the City police are all gold. The City has a two-inch stripe down the britches that we don't have.

Q I notice you are wearing a holster. Do you carry a gun on the job?

A I do.

Q And do the uniform guards that work under you also carry guns?

A Yes, sir.

Q What is the relationship of yourself and the security guards under you to the Portland City Police?

A Well, we are special police and we do not have

the authority to work any place except in the Lloyd Center.

Q And do you hold the special police status by virtue of a commission of some sort?

A Yes, sir.

[5] Q And that is in writing?

A Yes, sir.

Q Where do you keep yours?

A In my wallet.

Q Could I see it, please?

A Yes, sir. Here is my City and that is my State, retired (exhibiting documents).

MR. NEIL: I don't want to take these away from you for copying. Could we make copies of these?

MR. MILLER: I think so.

MR. NEIL: Why don't you do that. I would like a copy of both of them, and if there is anything on the reverse side, also on the reverse. Why don't we wait, to facilitate this, and just agree that these will be marked and we can ask him questions from the originals.

MR. MILLER: I am trying to get it out of here so you don't have to—

THE WITNESS: That is the only one that has anything to do with the City.

MR. NEIL: Could I see the State, too?

MR. MILLER: Would you take that State one out, Captain.

Off the record.

(Discussion off the record.)

Q (By Mr. Neil) Now, Captain, we will have copies made of [6] these and I am referring now to the one that is entitled, "City of Portland, Oregon, Department of Public Safety, Bureau of Police." I notice it is dated April 23, 1969. Are these renewed annually?

A Yes.

Q And have you had one like this for each year since

you have been employed by the Lloyd Corporation?

A Yes.

MR. NEIL: I will ask that a copy of the City commission be marked Exhibit 1 to this deposition.

(Photocopy of document was marked DEPOSITION EXHIBIT NO. 1, Boss deposition.)

Q Now, the other document, Captain, referring to the Department of State Police, designates you as a sergeant in the Department of State Police Reserves. Does this status have anything at all to do with your duties at the Lloyd Center?

A Not the least. That is just a retired card, I am retired now.

Q Were you formerly with the State Police?

A Yes.

MR. NEIL: I will ask that this document or copy of it be marked as Exhibit 2 to this deposition.

(Photocopy of document was marked DEPOSITION EXHIBIT NO. 2, Boss deposition.)

Q Have members of your security force or yourself had occa- [7] sion to either make arrests or to sign complaints causing arrests—

A Yes.

Q —during your tenure?

A Yes.

Q In what kinds of cases, for example?

A Mostly shoplifting, juveniles, mostly shoplifting.

Q And if juveniles are doing something other than shoplifting, what would you be referring to?

A We would just take them into custody or ask them to stand by until we call the juvenile officer, City of Portland.

Q Would this be when they are engaged in some sort of misconduct—

A Yes.

Q —on the Lloyd Center premises?

A Yes.

Q For example, what types of things?

A Oh, loitering or—you mean besides shoplifting?

Q Yes.

A Oh, where they would be causing a disturbance, like dumping over garbage cans or hollering or making a disturbance or anything of that nature.

Q Have you or any members of the security force ever arrested anyone for refusing to leave, that is, for trespassing or disorderly conduct?

[8] A (Shaking head.)

Q What is your answer to that one?

A No.

Q Have you ever arrested or signed a complaint against anyone for distributing literature on the premises?

A No.

Q Or for selling goods on the premises which shouldn't under your rules be sold there?

A No.

Q Do your men receive any form of written instructions as to how they are to conduct themselves?

A Yes; they—we have received instructions from Mr. Horn here and instructions are in our office.

Q In written form, is that correct?

A Yes.

Q And do those instructions include comments on powers or duties with respect to arresting people or making charges?

A Yes.

Q Have you or your men ever been advised as to what the policy of the Lloyd Center is with regard to the distribution of non-commercial materials in the public areas, that is the walkways, malls and so forth of the Lloyd Center?

A Yes.

Q Is that policy written or has it been stated to you orally?

[9] A It has just been orally to us.

Q And who gave you that policy?

A Mr. Horn.

Q And what is the policy?

A I can't tell you what the policy is word for word, but we have been instructed by the management not to let people deliver literature of any nature in the malls in the Center.

Q Does that also go for pins, medallions and things like that?

A Yes.

Q Have there been exceptions to that policy?

A Yes, sir.

Q Can you think of some?

A Yes. The only ones that I know of is the Foreign Legion poppy—

Q The American Legion?

A Yes, that's the only one.

Q Have the Volunteers of America or the Salvation Army been allowed to solicit in the public areas of the Lloyd Center?

A Yes, they have. They are stationed at a certain post. They don't loiter in the malls or go up and ask anybody for anything. They have regular points that they work from, certain areas where they ring their bells from. They don't move around in the Center.

[10] Q You don't really mean to say, do you, that they don't ask anybody for anything? When they ring their bells they are soliciting contributions, aren't they?

A Yes, but I mean they are in one certain area that they stay in; they don't go up and down the malls.

Q Is that true also of the Salvation Army?

A That is true with the poppies, also. They have tables set in a certain area and they stay in a certain

area and sell these poppies.

Q About this time of the year downtown here I have seen on occasion young girls selling Rose Festival pins on the street corners. Has that ever occurred at the Lloyd Center?

A Not to my knowledge.

Q You have had political rallies from time to time in the mall areas of the Lloyd Center, have you not?

A Yes, sir.

Q And has any literature or buttons or anything like that ever been distributed, to your knowledge,—

A No, sir.

Q —in connection with those rallies?

A That's right.

Q What about the Jehovah's Witnesses and their magazine called Awake, has that ever been sold or distributed at the Lloyd Center?

A Not to my knowledge.

[11] Q To your knowledge has any representative of the Jehovah's Witnesses ever attempted to do so?

A No; I can't say that I can recall.

Q Now, coming to November 14, 1968, which is the date on which the distribution in question here occurred, did you see literature that was being handed out for awhile that day at the Lloyd Center?

A I saw them hand out the literature.

Q All right.

A But I didn't read it.

Q All right. Did you pick up a copy of that from anyone?

A No, sir.

Q And who did you see hand out the literature? Did you see these two people sitting here, Miss Roberts and Mr. Tanner, hand out the literature?

A No, I don't think I did.

Q You saw some other people doing it?

A I saw a young fellow standing in—at the south

end of the bridge, which is the north door of Meier & Frank, on the mall level and he was—there was an officer with him by the name of Ford and he was handing out literature and I saw Ford go up to him and I went over and listened to the conversation.

Q Before I ask you about that, how long a period was it you saw this young man distributing literature?

[12] A Oh, it was just a couple minutes. I was on the other side of the bridge.

Q Was he moving around or was he standing in one place?

A I can't remember that. He was standing—when I got over there he was standing right in the door—or right on the sidewalk in front of the door.

Q Was traffic blocked by this?

A No.

Q There wasn't any demonstration—

A Oh, no.

Q —or anything going on, was there?

A No, not at any time.

Q Now, you say you were present when Mr. Ford—is it Mr. Ford?

A Officer Ford.

Q —Officer Ford talked to this young man; is that correct?

A Yes.

Q What conversation did you hear?

A I heard Ford say that we are not permitted to allow anyone to hand out literature in the Center, and while he was talking there was another gentleman came up, I don't know who he is, he was a well-dressed man between 35 and 40, and he also had some paper in his hand, some literature in his hand.

Q And that man remained present during the rest of the conversation?

[13] A Yes.

Q What else was said? Officer Ford told him the policy and what else was said?

A Well, this gentleman standing there stepped up and I—I can't remember what the exact words were that I had with this gentleman, but I assumed that he was one of the leaders there and I told him, I said, "We are not permitted by the Center to let anyone deliver pamphlets in the Center," and at that time I—it was just—just a very few moments there and I said that "If you want to obtain permission to deliver, you would have to get ahold of Mr. Horn, who is the manager of the Center," and he asked me where he was—where his office was and I told him, and at that time I asked him what his name was and he refused to give me his name and I said, "If you want to make an appointment, I will make an appointment for you to see Mr. Horn," and it was agreed upon that he would contact Mr. Horn at 1:30 at Mr. Horn's office, and he was shown as to where—how to get to Mr. Horn's office and then I went on my way.

Q Did you tell either of these persons or did Officer Ford tell either of these persons that they should leave?

A No.

Q Was anything said about them being prosecuted if they should continue to distribute literature?

A Only to this extent: We were advised by Mr. Horn that [14] there would be no arrests, and there was no arrest.

Q You mean about this particular incident?

A Yes.

Q When had he advised you that?

A Well, earlier in the day.

Q Mr. Horn had some word that these people were coming that day; is that right?

A That is right.

Q And he had told you what, now?

A He told us that there would be no arrests made.

Q What else did he tell you?

A He told us to be very polite and ask them to go out on the sidewalk if they wanted to continue—

Q All right.

A —with their handing out pamphlets.

Q And what did he say that you should do if they continued to distribute?

A Just ask them to leave and if—if there wasn't any —any violence or anything not to do anything—not to do anything, that we could—if violence occurred that we could—we would have to get a warrant.

Q All right. But if they continued to distribute after being told not to, your instructions were to do nothing with respect to that?

A Just ask them again to go out on the sidewalk.

[15] Q Did he say to report back to you if that should occur?

A Not that I can remember of.

Q In any event, these people did stop distributing after this discussion; isn't that correct?

A Yes, they did, and they went out on the sidewalk.

Q Now, did you have any further contact about this distribution that day?

A No, sir.

Q You didn't talk to anyone else by telephone or any person either with Lloyd Center or otherwise about this?

A No, I didn't.

Q Did anyone—

A I did—now, wait a minute; I did—I went to the office later and asked if this party had contacted Mr. Horn, but that is all there was to it; I never contacted any—

Q Were you told that he had?

A No; I didn't—I wasn't told anything. They didn't know whether he had come up there or not.

Q Did you make any report on the activities of this day with respect to this distribution?

A Only in my notebook is all.
Q In your notebook?
A Yes.
Q What do you do with your notebook?
A Well, I have a notebook and I put in every—what trans- [16] pired during the days.
Q And when do you make that entry, at the end of each day?
A No, I make the entry as it happens.
Q Where is that notebook now?
A It is in my pocket.
Q Could I look at it as to the page in question?
A Now, that is for this certain date, now?
Q Yes. I am only interested in what we are dealing with in this case, that is, the activities of November 14, 1968.

(Witness hands notebook to Counsel.)

Q Thank you. Where do I start?
A Right there (indicating).
Q You can probably read this better than I can. Why don't you read to the reporter the entries that have to do with this incident, I think starting there at 10:00 a.m.
A At 10:00 o'clock I was called into Mr. Sundt's office.
Q S-u-n-d-t?
A Right.
Q Just read it like it is there.
A At 10:00 o'clock was contacted by Sundt who advised that the American Civil Liberty Union are sending a group of people to hand out literature in the Center.
Q Go ahead.
A There will also be City officers around if trouble starts.
[17] Q Let me digress at the moment. Were there any City police officers called on that day?

A No.

Q All right, continue reading, if you will.

A Officials of union went to the Chief of Police and advised him that they were going to hand out literature in the Center. Now, this Doc—

MR. MILLER: Go ahead.

Q Just go ahead and read it and then explain.

A Doc requested three men to be contacted for extra duty.

Q I will digress. Who is Doc?

A Doc is Mr. Sundt, that is his nickname.

Q Who is Doc Sundt?

A Doc Sundt is the assistant manager of the Lloyd Center.

Q I see. Does that refer to three extra men employees of the Lloyd Center or regular police officers?

A No, that is my men.

Q Did you have three extra men come on?

A I did.

Q Do you remember who they were?

A Yes, Lieutenant Gloot, Sergeant Pulliam and Officer Ford.

Q And who were the regular men on duty aside from those people on this day?

A Myself, Officer Morris and Officer Unruh.

Q How do you spell that last name?

[18] A U-n-r-u-h.

Q Going back to your notes, is that where your notes end with respect to this day about these activities?

A No.

Q Could you read the next entry that has to do with these incidents?

A The next entry is at 11:20, hearing room with officers; obtained information from Mr. Horn regarding subjects delivering pamphlets in Center.

Q Is that continued?

A No, that is all.

Q What does that mean, to the best of your recollection?

A That is just what I told you before. Mr. Horn advised us that there would be no arrests made and that we would treat these people with all the respect that we would anybody.

Q So far you hadn't seen anyone distributing out there yet at this point?

A No, no.

Q Well, are there any other entries in your notes here that have to do with this day's incident?

A Yes, this contact at 12:45.

Q Why don't you read that one, then, into the record.

A 12:45 p.m., contact Ford—that is Officer Ford—with subject handing out literature in the Center. Requested his name, which he refused. Made an appointment to have him [19] talk to Mr. Horn at 1:30 p.m.

Q All right. You have already told us about that?

A That is it.

Q Any other notes—

A No.

Q —in these notes that have to do with that?

A No, sir.

Q All right. Let me digress back again to your relationship to the City police. Are these documents you have already shown me the only commissions you have, or is there some other commission?

A No, that is all I have, sir.

Q And is it true that all of your Lloyd Center security people hold similar commissions from the City of Portland?

A Exactly like that.

Q With respect to the conversation you overheard between Officer Ford and another gentleman, did you state that you saw Officer Ford talk to him for awhile before you arrived?

A He was talking to him when I—I was on the other

side of the bridge, on the north side of the bridge, and I seen Officer Ford talking to this gentleman and I walked across the bridge.

Q So it would have been—

A What he said I didn't hear until I got up there.

Q So that conversation might have gone on for a couple three [20] minutes before you got there?

A Oh, probably two minutes.

Q Now, I asked you about what reports you made. Did any other of your force make reports to you or to anyone else about this distribution or these conversations on this day?

A Well, it would be hearsay if I said that because I —I never heard it myself.

Q Well, I would like to know if anybody made written reports?

A No, sir.

Q So you are telling me if any reports were made they were made orally; is that correct?

A Correct.

Q And by these officers to whom?

A Later that day Officer Ford contacted Mr. Horn. Now, what was said I can't answer; I can't tell you that.

Q All right.

A I don't know.

Q Is Officer Ford still with the Lloyd Center?

A Yes, sir.

Q How about Officer Pulliam, is he still employed by Lloyd Center?

A Yes, sir.

Q Now, have you told me about all the conversations that you participated in either orally or by telephone with respect [21] to this distribution on the 14th day of November?

A Yes, sir.

MR. NEIL: I think I have no other questions. Why

don't you tell him about waiving signing of the deposition.

MR. MILLER: Captain Boss, this deposition will be typed, and when it is typed you can read it and make sure that it is typed correctly, or at this point you can waive the reading of the deposition if you want to. It would be entirely up to you as to whether or not you want to read it and sign it and be sure that it is accurate or waive the reading.

THE WITNESS: I will read it.

—:— FURTHER DEPONENT SAITH NOT —:—

/s/ Clifford P. Boss
CLIFFORD P. BOSS

[Jurat Omitted in Printing]

PLAINTIFFS' EXHIBIT NO. 15

[1]

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Civil No. 69-127

DONALD M. TANNER, BETSY WHEELER and SUSAN ROBERTS,
Plaintiffs,

vs.

LLOYD CORPORATION, LTD.,
Defendant.

DEPOSITION OF FRANCIS M. PULLIAM
Taken in behalf of plaintiffs

* * * *

[3]

FRANCIS M. PULLIAM

was thereupon produced as a witness in behalf of plaintiffs and, having been first duly sworn by the Notary, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NEIL:

Q Sergeant, my name is Carl Neil, as you know, and I am one—or I am the attorney for the plaintiffs in this case called Donald Tanner and others versus the Lloyd Corporation, and I am here today to ask you some questions about events that occurred at the Lloyd Center

on November 14, 1968, of which you may have some knowledge. If I phrase a question unclearly or in a way that you do not understand it, please feel free to ask me to clarify it and I will certainly try to do so.

I take it you are employed as a security guard by the Lloyd Corporation; is that true?

A That is true.

Q And you hold the rank of sergeant in the security force?

A Right.

Q And how long have you been employed as a security guard by the Lloyd Corporation?

A Since April 3, 1960.

Q And I take it your duties are performed entirely on the premises of the Lloyd Center?

[4] A Yes, that is right.

Q I notice you are in uniform today and you are wearing a holster and pistol.

A Uh-huh.

Q Is this the type of clothing and equipment that you carry on your job?

A Yes, with one exception. I usually wear a different holster and pistol.

Q But you normally do wear a holster and pistol?

A Yes.

Q And you wear a uniform such as you have on today?

A Right.

Q And would you say it is a fair statement to state that your uniform is quite similar, in appearance at least to the general public, as that of a Portland City Police officer?

A In most ways, yes.

Q Do you hold a commission as a special police officer of the City of Portland?

A I do.

Q And is that in a wallet-sized form?
A It is a card.
Q Yes. Do you have this on your person today?
(Witness produces card and hands same to Counsel.)
MR. NEIL: Off the record a minute.

(Discussion off the record.)

[5] MR. NEIL: Back on the record. Let the record show that Sergeant Pulliam has handed me a card, which I think Counsel and I can stipulate is identical, with the exception of the name, to the card marked as Exhibit 1 in the deposition of Clifford P. Boss, and also with the exception that on the reverse side under the term "Restrictions" it states on Sergeant Pulliam's card, "Weapon good only while in uniform," whereas Captain Boss's has no restrictions on it.

Is that agreeable as a stipulation?

MR. MILLER: Yes.

MR. NEIL: Thank you, Sergeant (returning card to witness).

Q I take it, Sergeant Pulliam, you have held a similar commission to that ever since you have been a Lloyd Center security guard?

A That is true.

Q Now, were you on duty as a security guard at the Lloyd Center on November 14, 1968, when some distribution of literature took place?

A Yes, I was.

Q And could you tell me when you first were advised that such distribution would occur or might occur?

A It was somewhere—somewhere about 10:30 or 11:00 o'clock on that same morning.

Q And who told you?

[6] A Mr. Horn.

Q And can you remember in general what he told you at that time?

A Just that there would be some—or might be some leafleting or distributing of literature.

Q And what instructions did he give you, if any, at that time?

A That we were to ask the people to stop or ask them to leave the Center.

Q And did he instruct you as to what you were to do if they declined to obey those instructions?

A Ask for their names and address and ask that they cease to distribute literature, advise them that if they didn't that a—possibly a warrant might be issued for their arrest.

Q Now, did you thereafter observe anyone distributing leaflets that day at the Lloyd Center?

A Yes, I did.

Q And would you please describe what you first observed?

A Insofar as I remember, the person I observed distributing literature was a lady who was leading a dog, I believe.

Q And where was she distributing literature at the time, what part of the Lloyd Center?

A In the East Mall, as I recall, because that's where I was—that's where I was assigned.

[7] Q Can you place it as near any particular business?

A No, I don't recall exactly where it was.

Q And she was handing out leaflets, was she, just to passersby?

A Evidently, yes.

Q How long did you observe that going on?

A For a very short time before approaching her and speaking to her.

Q When you approached her and spoke to her, was anyone else present at the conversation other than yourself and this young lady?

A Not at first.

Q What did you tell this young lady when you approached her?

A Just as I mentioned before, that Lloyd Center did not permit distribution of literature of any nature and that—and I asked her to stop and—and/or leave the premises.

Q And what did she say?

A I don't recall what she said exactly. It was—she protested that she had a right to do so.

Q Did she, in fact, cease distribution?

A She did, yes.

Q And where did she go?

A She went to the telephone to call, she said, the American Civil Liberties Union.

[8] Q Did you observe what she did then?

A She was still speaking on the telephone when Mr. Horn approached me and I told him that the lady at the phone had been distributing literature.

Q And did further conversation ensue with her after she finished her telephone call?

A To the best of my recollection I didn't speak with her any more.

Q But Mr. Horn may have; is that what you are saying?

A Yes, that is true.

Q And had Mr. Horn arrived when you were still speaking to her?

A No.

Q So that when you first spoke to her and prior to the telephone call the only parties to that conversation were yourself and the girl; is that right?

A So far as I remember.

MR. NEIL: Counsel, can we agree that the leaflet being distributed then was one of those in question in this case, either the exhibit attached to the Complaint or the other one you furnished me?

MR. MILLER: Well, I don't—

MR. NEIL: Let's go off the record.

(Discussion off the record.)

Q Did you look at these leaflets at all, Sergeant Pulliam?

[9] A No, I didn't.

Q Do you know anything at all about their content or what generally they were?

A I don't know of my own knowledge, no.

Q Did you ask for this girl's name?

A I did.

Q Did you get it?

A No.

Q And you mentioned earlier that your instructions were to ask for the name and, if necessary, to mention that a warrant of arrest might be issued if one did not cease distribution. Did you state that to this girl that a warrant of arrest might be issued if she did not stop distributing?

A I probably did. I don't recall specifically.

Q Did you see any more of this girl after you left her at the telephone booth? Apparently you left, but did you see any more of her thereafter that day?

A No, I didn't leave.

Q She left, is that it?

A I don't know whether she left after talking with Mr. Horn or not, I can't remember.

Q Where is the last point you saw her that day?

A As far as I can recall, right there at that—at the telephone or right close to the telephone.

Q And you had no further discussion with her?

[10] A Not so far as I recall.

Q And you did not, so far as you recall, overhear Mr. Horn or anybody else having any discussion with her?

A I was not close enough to them to hear their conversation, no.

Q Did you see any other persons distributing literature that day other than this girl you have described?

A I saw other persons but I didn't have any contact with them myself.

Q Where were they distributing?

A I believe it was in the North Mall. I can't be certain of that.

Q And you just saw them from a distance; is that it?

A Uh-huh.

Q And to your observation were other security guards talking to them?

A I know one other was. I am not sure of any other ones, though.

Q Who was the other man or security guard you saw talking to one of them?

A Officer Ford.

Q And to your knowledge was the literature that you observed at the distance being distributed apparently the same literature as the girl you saw was distributing?

A So far as I know.

[11] Q Have you told me now about all the distribution you saw on that day of literature in the Lloyd Center?

A All that I can remember seeing.

Q Did you make any report about the events you have just described to me to anyone at Lloyd Center?

A I probably discussed it with them, yes.

Q Who in particular?

A I don't remember—I don't recall who.

Q Would it have been either Captain Boss or Mr. Horn?

A It probably was, or maybe both of them.

Q To your knowledge did you make any written report?

A No, I did not.

Q So any report would have been oral?

A Right.

Q And do you keep any personal notebook or anything of that sort?

A I do, yes.

Q And did you make any entries in it for this day that pertained to what you have described here?

A No, I didn't.

Q Was there any particular reason why you didn't?

A No particular reason except I probably didn't feel it was important enough.

Q Have you ever had occasion on other days to ask other people to stop distributing in Lloyd Center other literature?

[12] A Yes, I have.

Q And can you remember an example of what type of literature or what kind of distribution was going on on those occasions?

A Not specifically, no. There have been times when commercial literature was being distributed, being placed on automobiles, and there have been times when political literature was being passed out.

Q And on those occasions you made similar requests to that you have already described—

A Right.

Q —to cease and desist?

A Right.

Q Have there been any occasions when people didn't stop distributing when you told them to?

A Not that I recall.

Q So you have never had occasion actually to cause anybody to be arrested for distributing?

A No, that has never been done.

Q What you are saying is it has never been done because no one has ever continued distributing after being told to stop; is that right?

A Possibly.

MR. NEIL: I think I have no further questions of Sergeant Pulliam.

[13] MR. MILLER: No questions.

Officer Pulliam, under the Federal Rules of Procedure you are privileged to read and sign this deposition when Mr. Michelet has prepared a copy of it, or you can at this time waive the reading and signing if you wish. Do you have a preference as to whether you would read it and sign it or waive it?

THE WITNESS: Well, I can't see that it makes any difference, really.

MR. MILLER: Do you want to waive the reading?

THE WITNESS: Yes, let's do that.

—:— FURTHER DEPONENT SAITH NOT —:—

[Jurat Omitted in Printing]

PLAINTIFFS' EXHIBIT NO. 16

[1]

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Civil No. 69-127

DONALD M. TANNER, BETSY WHEELER and SUSAN ROBERTS,

Plaintiffs,

vs.

LLOYD CORPORATION, LTD.,

Defendant.

DEPOSITION OF CHARLES R. FORD
Taken in behalf of plaintiffs

* * * *

[3]

CHARLES R. FORD

was thereupon produced as a witness in behalf of plaintiffs and, having been first duly sworn by the Notary, was examined and testified as follow:

DIRECT EXAMINATION

BY MR. NEIL:

Q Mr. Ford, as you know, I am the attorney for these plaintiffs, Mr. Tanner and two young ladies, in this case against the Lloyd Corporation. We are here today to ask you a few questions about events that occurred at the Lloyd Center on November 14, 1968, of which you may have some knowledge. If I phrase my questions to you in any way that you don't understand

or you aren't clear about, please feel free to ask me to clarify the question and I will do so.

I take it that you have been employed by the Lloyd Corporation as a security guard?

A That's right.

Q And I know you are recuperating right now, but are you still so employed?

A Well, I am on the insurance list. I have been replaced in the position, but as long as I am on insurance—

Q You were, however, on active duty—

A Right.

Q —on November 14, 1968?

A Right.

[4] Q How long had you been a security officer for the Lloyd Center?

A Covering both times, approximately five years.

Q And there was a gap in there between periods, was there?

A At which time—yes, at which time I was still employed as an extra.

Q I see. And in your job at the Lloyd Center as a security guard, I take it you always wear a uniform, do you?

A Right.

Q And carry a gun and holster?

A Yes.

Q And was your uniform similar, at least to the general public, in appearance to that of a Portland City Police officer?

A Right.

Q And did you hold a commission as a deputy Portland Police officer?

A Special police.

Q That's what I meant,—

A Right.

Q —special police officer.

A Uh-huh.

Q And that was true throughout your employment as a security guard, was it?

A Yes.

Q In fact, you hold it now?

[5] A Yes.

Q Now, coming to the events of November 14, 1968, were you advised by anyone on that date that there would be some distribution of leaflets going on at the Lloyd Center?

A Yes, we were.

Q Who told you that?

A Mr. Horn.

Q And do you recall approximately what time of the day?

A Well, approximately—I can give you reasonably close to that (consulting records).

Q You are referring now to what, your personal notebook?

A Yes.

Q And were the entries in that notebook made for November 14th on that date?

A My scratching was—notes was entered in here possibly a day and a half or two days later. I would say 11 to 11:20 at the office there; 11:20 I have approximate.

Q And what do you recall Mr. Horn telling you at that time?

A Well, we were notified that there was going to be parties distributing pamphlets in the area.

Q And were you given any instructions as to what to do about it?

A We were instructed basically our usual routine of notifying them that this was not a basic procedure of the [6] Lloyd Corporation.

Q And were you told on this occasion what to do? Well, first of all, were you told to instruct them to stop distributing in the Lloyd Center?

A Correct.

Q And were you told or given any instructions as to what to do if they continued to distribute after being told to stop?

A We were advised to advise them that this procedure was not considered a practice of our area owing to the litter, and without a special permit from them we would have to advise them to go to the street, which was basically our understanding is public property, and they could pass all they wanted to, yet at the same time notify them that the Lloyd Corporation didn't allow even their own tenants to distribute anything outside of their stores.

Q And were your standing instructions to request the names of the distributors?

A If they wouldn't cooperate we were advised to try to get their names and recommend them to contact our supervisor or Mr. Horn.

Q Also were your standing instructions if they, as you put it, refused to cooperate you should mention the possibility that a warrant could be issued for their arrest?

A In the field it was not a general practice.

Q Well,—

[7] A Nor was it advised any more that day than a regular routine.

Q All right. Now, later in the day did you actually see anyone distributing literature at the Lloyd Center?

A I did.

Q And will you tell us about when and where and what you saw?

A The first observation was a subject at the air door of Meier & Frank's right at the bridge.

Q That opens off the interior central mall; is that correct?

A Right.

Q And what did you see there?

A There was a subject there passing out pamphlets.
Q Male or female?
A Male.
Q Just one?
A As I recall, I had a notation of one or two—
Q And how long did you—
A —at the first observation there.
Q And how long did you see them distributing?
A I probably watched for a matter of three or four minutes, something like this.
Q And then what did you do?
A I walked over and started talking to the man and told him our regulation prohibited passing out literature in the [8] malls.
Q And what did he say or do?
A And he said, well, he—now, this isn't the exact word, quote,—
Q All right.
A —but similarity, that they had permission to come into the Lloyd Center to pass out this said literature.
Q Well, then what happened?
A He was going to speak to his—whoever was in charge. Now, this man was there; his location I don't know.
Q He was going to speak to some other man?
A Some other party of their group.
Q Did he leave your field of vision?
A He walked off going west. I went on around my regular routine in the mall.
Q And he didn't distribute any more to your observation?
A At that particular time he had stopped.
Q All right. And at this time with this particular gentleman did you—you said you told him that it was the policy at Lloyd Center—
A Right.

Q —not to distribute any literature in the Lloyd Center; is that right?

A Right.

Q And did you ask for his name?

[9] A This particular instance I didn't.

Q All right. Did you mention to him that a warrant for his arrest could be issued if he continued to distribute?

A I did not.

Q Did you see any other persons distribute literature at the Lloyd Center on that date?

A Yes. Possibly another ten minutes or so later—now, here again this is not absolutely correct time (consulting records)—I would say probably another ten to 15 minutes elapsed and I saw another party in the same location.

Q Again near the entrance to Meier & Frank's in the Central Mall?

A Right.

Q And again distributing the same literature?

A The same literature.

Q By the way, did you look on either occasion at this literature?

A I paid no attention to it necessarily, no.

Q Did you take a copy of it?

A That particular time I don't believe I did.

Q Well, on any occasions that day did you?

A I did have a copy of it. It was never detained or held or anything like that.

Q You got a copy that one of these persons gave to you; [10] is that right?

A There is no question that what I did.

Q All right.

A Now, this is because nearly every time a contact is made this is the usual routine.

Q And was this literature that was inviting people to some meeting that was to be held that night?

A Frankly I didn't read it.

Q You saw this second person distributing. Male or female?

A Male.

Q And what did you do then?

A I walked over and explained to him the same thing, that the literature was prohibited from being distributed in there according to our regulations, and in order to continue to do so they would have to get a permit or a clearance from our office.

Q And what did this gentleman say or do?

A As I recall they—the statement would be that they had permission and that this was a public thoroughfare, that they could do this.

Q But did he in fact stop when you ordered him to?

A He was very cooperative. He talked; there was no belligerency; we carried on a conversation in regards to it.

Q And where did he go?

A And I said that he would have to get a permit from the [11] Lloyd Center if he—

Q And where did he go?

A Now, this again is accurate time that I am quoting. We went to the Lloyd Center office.

Q And in the company of one of these gentlemen?

A In the company of this second party.

Q All right. And what occurred there?

A I took him up to the Lloyd Center office to talk to supposedly Mr. Horn, which at that time Mr. Horn didn't happen to be in.

Q And did you wait around?

A I waited there awhile and he talked to our captain, Captain Boss, who happened to be in this particular office at the time.

Q And were you present at that discussion?

A On the sideline, yes.

Q Well, did you overhear it?

A I overheard it but made no particular notes of any other than, as I say, our general routine of work.

Q Did you ask for this gentleman's name, this second gentleman?

A This I cannot recall.

Q Did Captain Boss, to your recollection?

A Accurately, no; but a general routine the answer would be yes.

[12] Q Do you know whether Captain Boss said anything to this gentleman about the possibility of arrest if he continued to distribute?

A To my knowledge at no time was ever the word "arrest" used.

Q Well, I think you would agree that you can imply it as well as state it directly, can't you?

A This is a possibility.

Q To your knowledge was it implied that one might be arrested, not necessarily by Lloyd Center people, but that they might be arrested if distribution continued?

A There is no question but what that statement would imply possibly to the answer.

Q And when you left, I take it this gentleman still was in the office with Captain Boss, or did you accompany him out?

A To my recollection I went out.

Q Did you observe any further distribution on that date at the Lloyd Center?

A Yes, on the Halsey Street, as we say, crosswalks, on the street right-of-way.

Q This would be on what you consider the public sidewalk—

A Yes.

Q —on the north side of the main part of Lloyd Center?

[13] A It would be the north side of basically Lloyd Center.

Q But the south side of Halsey Street; is that correct?

A At that particular time there was parties on both sides of the street.

Q And you saw people distributing the same literature out there; is that right?

A Right.

Q And did you have any conversation with any of them?

A At this time, as I recall, I went over and I talked to the party that I had first contacted in front of Meier & Frank's and we just conversed as a friendly gesture and that this was all permissible but down at the other part inside wasn't.

Q And did you talk with any of the other distributors other than this one gentleman?

A I talked to the—basically together at that time there was a woman there.

Q You mean with this first gentleman?

A With this first gentleman, yes. Also they had a little child with them.

Q Other than that, did you see any other distribution that day within the Lloyd Center?

A Not within the Center.

Q With respect to the two occasions of distribution within the Center that you already testified to, were those [14] persons in any way blocking the access to Meier & Frank?

A This covers a big ground.

Q Well, were they making it difficult for people to get in and out of Meier & Frank?

A I would say they were indirectly in a means obstructing traffic.

Q Well,—

A Let's put it this way: Any time anyone stands in this particular location you have got the public going around this way because there's always a stoppage.

Q Well, the entrance to Meier & Frank there at that point is probably, what would you say, ten to 12 feet in width?

A Correct.

Q And so, then, you say they were both standing in that general area?

A There was just one there.

Q At different times, though?

A Yes.

Q They were both standing in the same general area?

A Right.

Q Was it squarely in front of the entrance or was it to one side of the entrance?

A This I couldn't definitely state other than basically in front of it, which would automatically be in my mind seem reasonable centered. It could be a third, it could be [15] a half, but to pinpoint this down to an exact location this I wouldn't remember.

Q And would it be your testimony that they were obstructing pedestrian traffic to the same extent that any one person standing in that location might obstruct such traffic?

A More so.

Q More so?

A Correct.

Q Why would that be?

A As I stated, that location with any amount of pedestrian traffic, anyone distributing anything there's a certain amount of stoppage and groups of maybe two or three that have to stop, hesitate and go around here or go around there (demonstrating),—

Q I see.

A —owing to the fact that a big percentage of them will momentarily stop, open this up, look at it and walk on.

Q Was there any serious disturbance resulting from this distribution in the sense of reaction or difficulty?

A At no time was there any disturbance to my knowledge.

Q Did you make any written or oral reports to your superiors or other employees of Lloyd Center about these things you observed?

A I did not because of the simple reason that it was such a routine that a report from us to them wasn't— [16] wouldn't be required under any normal conditions.

Q You have mentioned that you have your notes that you think were made possibly a day or two after November 14th. Could you point out to me the portion of your notes that deal with that date?

A Now, here is my rough note right here (handing document to Counsel).

Q Now, you are handing me a slip of paper. You said this was made a day or two—

A This was dated as of the time—the afternoon of that day of—

Q Of November 14th?

A Of November 14th.

Q And could you translate for me what your handwritten notes there say?

A Well, here is your contact being April 30—or I mean approximately 12:30 would have been the time that I contacted this subject in front of Meier & Frank's.

Q The first one?

A Yes.

Q All right.

A Which, as I have entered it here, this is our report time to the office at 12:20; 12:20 is what this is.

Q Let me ask you this: Have you used this little sheet to make a fuller translation into your notebook— [17]

A Correct.

Q —of what your—

A Yes.

Q Could I see the notebook for just a moment?

A Yes (handing notebook to Counsel who examines same.)

Q And where does it end?

A The end of this would be right down here (indicating).

Q And the things below that have nothing to do with this?

A Nothing to do with that.

Q Let me read this for the record and you correct me if I am reading it wrong.

A All right.

Q You have got 9/14/68 but I think you mean November 14, '68?

A Yes, correct.

Q The first entry is April—or, pardon me, "Approximately 11:20 a.m. report to office re briefing—"

A "—of passing literature."

Q "—of passing literature."

The next entry, "12:20 contacted subject"—and what is this in paren?

A This is "Poncho, beard and barefoot."

Q Oh, poncho, beard and barefoot.

A "Air door Meier & Frank's." That is the location.

Q "Advised subject of no passing of literature in—"

[18] A Center.

Q The next entry is 12:35, "Second subject Meier & Frank." What is this word?

A That is "Suit." In other words, he was wearing a suit.

Q "Escorted same to office. Captain Boss talked to same." What is this word?

A "Appointment with Horn 1:30." There was an appointment made with Horn—or with the office to meet Horn there at 1:30.

Q For this subject to?

A For this subject, right.

Q The next entry, "1:15 contacted subject," and what is this entry?

A This is "Crosswalk."

Q I see.

A "Crosswalk near phone booth." That is right there on Halsey, we call that the crosswalk.

Q Would this be outside the Lloyd Center?

A This is—the phone booths are on the inside in the Lloyd Center.

Q Now, this is the same subject who had made the appointment; is that right?

A Right.

Q And the note says he would not have to wait until 1:30 as Mr. Horn was coming across the mall; they talked; [19] resumed patrol. So that indicates that this subject had a conversation with Mr. Horn?

A Correct.

Q And were you present at that conversation?

A Within a matter of, oh, say five or six feet.

Q Did you overhear any of it?

A Partially, yes; all of it, no.

Q And what do you recall hearing Mr. Horn tell this gentleman?

A Now, it was re-advising them the policy of the Lloyds Corporation of prohibiting distributing of literature inside the mall and the possibility of them trespassing on private property.

Q Anything said about arrest that time?

A At no time in my hearing was there ever the word "arrest" used.

Q All right. Was this gentleman having a conversation with Mr. Horn, was that the gentleman in the poncho, beard and barefoot?

A The man with the suit?

Q The man with the suit?

A Yes.

Q The second man you had seen distributing?

A Correct.

Q And he was also the gentleman for whom an appointment [20] had been made to see Mr. Horn originally?

A Correct.

Q When did you first become a security guard at the Lloyd Center?

A Oh, I would have to go back to get the exact date, but I think it was possibly the latter part of '62.

Q Over the years you have worked there have you ever observed any non-commercial activities going on in the malls and walkways with the permission of the Lloyd Center?

A The only ones that I can recall that permission has been—commercial? No.

Q I was talking about non-commercial.

A The Veterans' poppy sales as I recall is all; and at Christmas-time they have the Salvation Army.

Q The bell ringers soliciting funds?

A Yes.

Q Also the Volunteers of America doing that in some years?

A Oh, various organizations doing that during that particular time.

Q Have you seen Boy Scout displays in the malls or walkways?

A We have basically a once-a-year display of Boy Scouts.

Q And that occurs on the central walkway or malls?

A This is basically through the malls.

Q There are several displays that are at different points?

[21] A This is a special program, to my knowledge, that—the same as they have right now, anniversary week.

Q Has there ever been a football rally held in the Center in the main mall?

A I tell you if there has been I have never been a witness to it.

Q During the presidential campaigns have you ever observed any presidential candidates holding rallies or meetings in the center mall?

A This again I would say I have not.

Q From time to time I seem to recall I personally have seen some strolling musicians in the center mall of the Lloyd Center and I don't really know in what connection. Have you ever seen that?

A I have.

Q And in what capacity were those people there?

A I would say through the—what would you call it—public relations or advertising or whatever it might be from Lloyd's Corporation.

Q This would be a program that the Lloyd Center itself had sponsored?

A Correct.

Q Was it something like a birthday celebration of the Center, something like that?

A Annuals, yes.

[22] Q What kind of other events would go on in the central mall in addition to the strolling musicians in that line or connection?

A They had a—in the ice rink they have the crowning of the queen.

Q Of what?

A Of—I knew you were going to ask me that and I don't know just exactly—and I have witnessed two of them—just exactly what these are.

Q Is this a Lloyd Center—

A This is Lloyd Center sponsored.

Q And at Christmas time you have had school choirs in and that kind of thing in to sing in the central mall, haven't you?

A Under the sponsoring of the Lloyd's Corporation.

Q There is a public auditorium—well, I won't call it public, but there is an auditorium located in the lower level of the main part of the Lloyd Center; isn't that right?

A Correct.

Q And that is let out to various groups and organizations on a rental basis, is it?

A Right, to my knowledge.

Q Are there also some that use it on a no-charge basis?

A As far as I know it is all that way.

Q It is all on what?

[23] A A no-charge.

Q I see. And meetings there are held in the evenings on occasions, aren't they?

A Occasionally.

Q And all kinds of groups have met there, isn't that right, from political parties to all sorts of profit or non-profit groups, I take it?

A Correct.

Q And also for meetings that have been held during the daytime?

A Right.

Q Is access available during 24 hours a day to the malls and walkways of the Lloyd Center?

A To pass through, yes; loitering, no.

Q People can go through if they want to?

A Correct.

Q If they stuck around any undue length of time you would begin to wonder what they were doing there after business hours; is that it?

A That's right.

Q But the parking areas, I take it, are blocked off after some certain hour?

A Right.

Q Like what, 9:00 p.m. or something?

A No. The complete lockup would be possibly—other than [24] some special doings—would be basically midnight, 11:30 to 12:30.

Q That is when the parking lot is closed, too?

A When everything is closed up tight, right. I mean everything.

Q Everything?

A Right.

Q But if I were to stroll through the central mall and the malls going to the sidewalks and streets at 2:00 a.m., I could do it, I take it?

A There would be nothing in the world—you wouldn't even be contacted. There is no question but what you would be observed.

MR. NEIL: I don't think I have any further questions.

CROSS EXAMINATION

BY MR. MILLER:

Q Mr. Ford, did one of these people distributing literature say something to you about going to eat while—

A Yes.

Q What was said in that connection?

A This party with the poncho, the beard and hat and barefoot and the woman with the little child asked me where a good place would be to eat, because it was a cold day, if any of us recall, and I advised them to go on down to the Manning cafeteria because they could go in there and get their [25] eats and go into the back and it was warm, it was out of the way, not a very big crowd other than just at the rush hour, which they did. In fact, adding to your question, I met them after they had been there and they basically thanked me for having them go down, it was so good. It turned out the young-

ster could sit there and not be molested or bother anybody.

MR. MILLER: I don't have any more questions.

MR. NEIL: I have nothing further.

MR. MILLER: Mr. Ford, this deposition will be typed out, the questions and answers will be typed out, and after that is done, the Federal Rules of Procedure provide that you may have the privilege of reading it and signing it if you want to. If you don't think that would be necessary you can waive the reading and signing if you wish to. Whether you would read it and sign it or waive the reading is entirely up to you. Do you have any preference in that respect?

THE WITNESS: Well, I believe my answer is yes. I am a little bit against putting my name on any blank, period. Does this answer it? I am not against singing it, no.

MR. MILLER: Do I take it, then, you want to read and sign it?

THE WITNESS: Preferably, yes.

[26] MR. MILLER: Fine.

—:— FURTHER DEPONENT SAITH NOT —:—

/s/ Charles R. Ford
CHARLES R. FORD

[Jurat Omitted in Printing]

PLAINTIFFS' EXHIBIT NO. 17

August 24, 1960

Mr. Ed Thomas
Porter Advertising Agency
515 Builders Exchange Bldg.
Portland 4, Oregon

Dear Mr. Thomas:

Thank you for your August 16 letter regarding the Salvation Army Christmas kettles.

We have greatly restricted the use of the malls as to sales and solicitations but we recognize the great work the Salvation Army is doing. It is therefore agreeable that the Salvation Army Volunteers and Christmas kettles be in Lloyd Center during the Christmas season.

We have discussed this with the Directors of the Merchants Association who feel the same as we do. They do request that the kettles be placed in strategic places in the malls but far enough from the store doors so as not to impede shopping traffic.

I am sure there will be no problem regarding this, so when the time comes would whoever is in charge please contact Mr. Sundt or Mr. McKinney of this office with regard to specific locations.

Sincerely,

RICHARD C. HORN
Manager

RCH:es

PLAINTIFFS' EXHIBIT NO. 18

November 21, 1967

The Salvation Army
20 S. W. Sixth Avenue
Portland, Oregon 97204

Gentlemen:

As in previous years, we assume you will wish to have Army Kettles in Lloyd Center during Christmas month. Because Volunteers of America will also be here and because it is necessary to limit the number of Kettles, we request that each organization have three only.
Thank you.

Sincerely,

RICHARD C. HORN
Manager

RCH:bh

P.S. No bands are permitted in the Center except those sponsored by the Merchants Association.

PLAINTIFFS' EXHIBIT NO. 19

August 29, 1960

Mr. Clay A. Sloat
5814 N. E. 16th Avenue
Portland 11, Oregon

Dear Mr. Sloat:

Your letter to the Lloyd Center Merchants Association regarding sale of the War Cry magazine was discussed by the Board of Directors of the Association.

The Board is not unmindful of the work the Salvation Army is doing and, as a matter of fact, had made arrangements with the Army for the placement of their Christmas kettles. However, use of the malls for sales and solicitations are being greatly restricted. In some instances a worthwhile effort will be refused only because it might set a precedent as far as allowing unworthwhile, or at least marginal fields, and solicitations.

Because of this the Association wishes to proceed cautiously.

Therefore, while the Association has presently denied your request to sell War Cry it does not mean that it is a permanent denial, and can later be reconsidered.

Thanking you for your letter, I am

Sincerely,

SAM MCKINNEY

SM:es

PLAINTIFFS' EXHIBIT NO. 20

September 15, 1964

Mr. Lloyd Tupling
326 New U. S. Court House
Portland, Oregon

Dear Mr. Tupling:

On August 27th I sent a letter to Martha Ann Adelsheim offering the facilities of Lloyd Center as a forum site for President Johnson and Senator Humphrey if and when they visit Oregon this election year for a political speech.

I believe this invitation will be of interest to you since an appearance at Lloyd Center offers the following advantages to the candidate visiting Portland:

1. Easy accessibility from Portland International Airport.

2. A dramatic setting for an address. Our spiral staircase is a natural stage with standing area for thousands in the Plaza and along the malls.

   We will decorate the stage area and provide a quality hi-fidelity sound system with complete center-wide coverage. Candidate has easy entrance and exit without going through crowd, if desired.

3. A built-in audience in a concentrated area. Thousands of people would be able to see and hear the Democratic candidate.

4. Lloyd Center has available video telephone cables for nationwide telecasts. As you probably know, ABC-TV televised the Oregon Primary returns live from the Center.

5. Security force trained in crowd control. In 1962 our police department handled a crowd of 20,000 at the Ella Fitzgerald concerts.
6. A conference room for staff traveling with the candidate.
7. Auditorium for News Conference, completely set up as required by the candidate's News Director.
8. Reserved parking area for news media.
9. Free parking for 8,000 cars within a few minutes walk from where candidate is to speak.
10. Booth in a central location for distribution of campaign material.
11. Extensive advertising and publicity would be provided by Lloyd Center.

I believe that our convenient location and setting would provide the largest audience President Johnson and Senator Humphrey could attract in Oregon.

We offer the Democratic candidates complete cooperation and use of our facilities in order to make their appearance in Portland as effective as possible.

I hope you feel this proposal has merit. If so, then I would like to get together with you to go into more specific details.

Respectfully,

RONALD G. SCHMIDT
Director of Public Relations

RGS:bh

PLAINTIFFS' EXHIBIT NO. 21

January 2, 1964

Mr. Phillip Roth, Chairman
Republican State Central Committee
506 Executive Building
Portland, Oregon

Dear Phil:

I would like to offer you the facilities of Lloyd Center as a forum site for candidates visiting Portland in the campaign for the Republican presidential nomination.

Lloyd Center offers these advantages to a presidential candidate visiting Portland:

1. Easily accessible from Portland International Airport via the Banfield Freeway.
2. A dramatic setting for an address. Two locations are available to the candidates for a speech at Lloyd Center. Either the Bridge over the Ice Rink, or the West Mall parking deck. We will construct a stage specifically for the candidates, with decorative bunting and a quality hi-fidelity sound system with center-wide coverage.
3. A built-in audience in a concentrated area. Thousands of people would be able to see and hear a candidate from either of the above locations.
4. The Center is equipped with video telephone cables for nationwide telecasts.
5. A conference room for staff traveling with the presidential candidate.
6. A security force trained in crowd control.
7. Auditorium for News Conference, completely set up

and coordinated by a member of Lloyd Center's Public Relations staff, if desired.

8. Reserved parking area for news media.
9. Free parking for 8,000 cars; 3,500 under cover.
10. Special booth located in Central Plaza for campaign material and posters.
11. Location is centralized, only minutes from Portland International Airport and downtown Portland.

I will assist the candidates' press relations men in order to make the individual candidates' visit to Lloyd Center as beneficial as possible.

Lloyd Center is offering this service to the candidates for presidential nomination in both parties as part of its continuing community relations endeavor.

Sincerely,

RONALD G. SCHMIDT
Director of Public Relations

RGS:bh

PLAINTIFFS' EXHIBIT NO. 22

September 24, 1964

Mr. Harry E. Williams
1837 S. E. 41st Avenue
Portland, Oregon 97214

Dear Mr. Williams:

In the event there is no Veteran's Day parade, we would like to have your group consider the following proposal for a Veteran's Day program at Lloyd Center. As you will see from the program we have outlined, it will require the cooperation of your Veteran's organizations to provide a specific number of people in order for this event to be successful from your standpoint, as well as ours.

We suggest that the "Salute to Veterans" be a 15-minute program with strong community appeal. At 10:45 a.m. on November 11, the program would begin with Color Guard and drummers marching from three (3) locations in the Center to the Central Plaza. This would require three separate Color Guard units and drummers.

The program itself would take place in Lloyd Center's Central Plaza with the spiral staircase serving as a stage. When the Color Guard reaches the Plaza, the colors would assemble and the Leatherneck Band would play the National Anthem. Immediately after the song, our speaker, John Salisbury, would deliver a brief talk on the meaning of Veteran's Day. At the conclusion of his talk—precisely at 11 o'clock—the colors would be lowered while taps are played.

We would like to have as many American Legion Post flags as possible assembled in the Plaza in a large horse-

shoe design. Lloyd Center would place American flags on the bridge over the ice rink throughout the day.

I believe you will find that a Veteran's Day program of this type will afford more extensive press and television coverage than would be received from the annual parade. This is only important because our citizens must not forget those who have died for our country, or who are living and contributed so much.

I am available to meet with your organization at any time, at your convenience, to explore the possibility of a program of this type.

Please let me know if you have any questions regarding the above proposal. We are ready to begin making final arrangements once your group has given its approval.

Sincerely,

RONALD G. SCHMIDT
Director of Public Relations

RGS:bh

PLAINTIFFS' EXHIBIT NO. 23

August 15, 1962

Mr. Ted Mesang, Director
Oregon State University Marching Band
Corvallis, Oregon

Dear Mr. Mesang:

Lloyd Center would like to invite the Oregon State University Marching Band to appear in Portland on Saturday, October 13, at 11:00 a.m., for a big pre-game rally in our central plaza.

We would like to make this the biggest football rally OSU has ever held in Portland. And, with the cooperation of your department, as well as the Pep and Rally Squads, I am sure we can.

I would appreciate it if you would let me know if October 13, before the OSU—University of Washington game, is available for you. If not, please let me know what date would be most convenient and we will proceed with plans for the biggest pre-game OSU rally Portland has ever seen.

Sincerely,

RONALD G. SCHMIDT
Director of Public Relations

RGS:bh

PLAINTIFFS' EXHIBIT NO. 24

RESOLUTION NO. 28669

WHEREAS by Ordinance No. 101288, passed by the Council November 10, 1954, as amended by Ordinance No. 107641, passed by the Council March 20, 1958, the Lloyd Corporation Ltd., was required to have constructed buildings having a minimum area of 850,000 square feet with off-street parking, and that Lloyd Corporation, Ltd., should have dedicated by December 11, 1961, certain area for public streets in lieu of streets vacated within the Lloyd Center area; and

WHEREAS Lloyd Corporation Ltd. has fully complied with the requirements of Ordinance No. 101288 and 107641 and has fully completed the terms and provisions to be performed by it; now, therefore be it

RESOLVED that completion of the terms of Ordinance No. 101288, as amended by Ordinance No. 107641, passed by the Council March 20, 1958, by the Lloyd Corporation Ltd., is hereby acknowledged, and Lloyd Corporation Ltd., is hereby relieved of any further obligations or conditions assumed by the provisions of said ordinances.

Adopted by the Council December 6, 1961.

/s/ Ray Smith
Auditor of the
City of Portland

Commissioner Bowes
11-30-61 R.S.I.
RLH:gm

AGB

Plaintiffs' Exhibit No. 24

194.

ORDINANCE NO. 107641

An Ordinance to extend for two years the time of completion as provided in Section 4 (a) of Ordinance No. 101288, relating to street vacations and dedications in the Lloyd project, so as to allow sufficient time for completion of work now under way, or for which bids have been received, or projects which are to be constructed in completing the project, and declaring an emergency.

The City of Portland does ordain as follows:

Section 1. The Council finds that Ordinance No. 101288 was passed by the Council November 10th, 1954, and is and was the "master" ordinance for street vacation and dedication in connection with the Lloyd project which was then being formulated, and that subsequent thereto there have been other ordinances which have modified to some degree the "master" ordinance in detail of vacation and of dedication and other ordinances have extended vacation and dedication areas, these ordinances being Nos. 105270, 105271, 106007, 106008, 106009 and 106640, and the Council further finds that in consideration of the vacations authorized by the "master" ordinance and the other ordinances above-mentioned, the Lloyd Corporation, Ltd. has deeded to the City of Portland certain properties in accordance with the requirements for dedication and has delivered to the City a title insurance policy with reference thereto, and the Council further finds that active construction is presently under way in the area in that utility services are being realigned in accordance with the overall plan, that the City has on deposit the sum of approximately $46,000 for the relocation of water lines and that bids have been received by the Lloyd Corporation, Ltd. for construction of a multi-million dollar shopping facility; that the bids as received are presently under review and that the Bureau of Buildings of the

City is engaged in a major project of checking the detailed plans and blue prints which have been filed in connection with the issuance of City permits for such construction and the Council further finds that because of the magnitude of the project the possibility exists that all phases can not be completed within 5 years from the effective date of Ordinance No. 101288, namely, December 11, 1959, and that in order that the Lloyd Corporation, Ltd. and the bidders may have full assurance that the provisions of the ordinances above-mentioned will remain in full force and effect until the completion of the project and at the same time a definite date should be fixed after which should the Lloyd Corporation, Ltd. not complete its project, street areas may revert to the City as provided by the above-mentioned ordinances, and the Council further finds that a two-year extension is reasonable under the circumstances; now, therefore, the time limit prescribed in Section 4 (a) of Ordinance No. 101288, namely, five (5) years from the effective date of this ordinance, namely, December 11, 1959, hereby is extended for a period of two (2) years to and including December 11, 1961.

Section 2. This ordinance shall be of no force and effect until and unless it shall have been accepted by the Lloyd Corporation, Ltd., who have petitioned for this extension of time under date of March 12, 1958. The said acceptance shall be by the Lloyd Corporation, Ltd. on behalf of itself, its successors and assigns, and shall be in writing and filed with the Auditor of the city of Portland, having first been approved by the City Attorney as to form. The Auditor shall, at the expense of the petitioner, the Lloyd Corporation, Ltd., file for record a certified copy of this ordinance after its acceptance, with the County Clerk, as ex-officio recorder for Multnomah County.

Section 3. Inasmuch as this ordinance is necessary for the immediate preservation of the public health, peace and safety of the city of Portland in this: Inasmuch as bids have been called for and received for the multimillion dollar project in the Lloyd tract and the awarding of contracts is presently being held up pending extension of time as by this ordinance provided, and thus delaying the opportunity for much needed employment in the city of Portland; therefore, an emergency hereby is declared to exist and this ordinance shall be in force and effect from and after its passage by the Council.

Passed by the Council March 20, 1958.

/s/ Terry D. Schrunk
Mayor of the
City of Portland

Attest:

/s/ Will Gibson
Auditor of the
City of Portland

Com. Bowes
AGB:dh
3/18/58

ORDINANCE NO. 101288

An Ordinance vacating, subject to conditions, all that portion of N.E. 11th Avenue lying between the north line of N.E. Multnomah Street and the south line of N.E. Halsey Street; all that portion of N.E. Clackamas Street lying between the west line of N.E. 15th Avenue and the east line of N.E. 9th Avenue, excepting area in intersection; all that portion of N.E. Wasco Street lying between the west line of N.E. 15th Avenue and the east line of N.E. 9th Avenue, excepting certain area in intersections; all that portion of N.E. 10th Avenue lying between the north line of N.E. Multnomah Street and the south line of N.E. Halsey Street; all that portion of N.E. 12th Avenue lying between the north line of N.E. Wasco Street and the south line of N.E. Halsey Street; all that portion of N.E. 12th Avenue lying between the north line of N.E. Halsey Street and the south line of N.E. Broadway, excepting portions in intersection; all that portion of N.E. 13th Avenue lying between the north line of N.E. Multnomah Street and the south line of N.E. Halsey Street; and all that portion of N.E. 14th Avenue lying between the north line of N.E. Multnomah Street and the south line of N.E. Halsey Street, all in the City of Portland, Oregon.

WHEREAS it appears to the Council that on the 6th day of August, 1954, Lloyd Corporation, Ltd., by Richard R. Von Hagen, its president, and David W. Yule, its assistant secretary, filed petitions with the City Auditor for the vacation of all that portion of N.E. 11th Avenue lying between the north line of N.E. Multnomah Street and the south line of N.E. Halsey Street; all that portion of N.E. Clackamus Street lying between the west line of N.E. 15th Avenue and the east line of N.E. 9th Avenue,

excepting areas in intersections, all that portion of N.E. Wasco Street lying betwen the west line of N.E. 15th Avenue and the east line of N.E. 9th Avenue, excepting certain areas in intersections; all that portion of N.E. 10th Avenue lying between the north line of N.E. Multnomah Street and the south line of N.E. Halsey Street; all that portion of N.E. 12th Avenue lying between the north line of N.E. Wasco Street and the south line of N.E. Halsey Street; all that portion of N.E. 12th Avenue lying between the north line of N.E. Halsey Street and the south line of N.E. Broadway, excepting portions in intersection; all that portion of N.E. 13th Avenue lying between the north line of N.E. Multnomah Street and the south line of N.E. Halsey Street; and all that portion of N.E. 14th Avenue lying between the north line of N.E. Multnomah Street and the south line of N.E. Halsey Street, all in the City of Portland, Multnomah County, Oregon, pursuant to the provisions of ORS 271-.080 to and including 271.170 and that at the time of said filing paid the required fees and also filed with the Auditor a consent in writing of all abutting property owners upon the portions of said streets proposed to be vacated and more than two-thirds in area of all the real property affected by such vacations and that thereupon the City Auditor gave notice by posting and publication for a period of four (4) successive weeks that said petitions together with any objections, remonstrances or claims for damages which may be made in writing and filed with the Auditor of the City of Portland, Oregon prior to the time of hearing would be heard and considered by the Council of the City of Portland, Oregon, at a regular meeting beginning at 9:30 a.m., Wednesday, September 15, 1954, in the Council Chambers of the City Hall in said City; said notices were first published in the City's official newspaper, to wit: Daily Journal of Commerce on August 13, 1954 and the last publication in the issue of September 3, 1954, and said Auditor within five (5) days

after said first publication further published said matter by posting three (3) notices headed "Notice of Street Vacation" in three (3) conspicuous places in each of the areas for each of said streets proposed to be vacated in the places herein described and designated as follows:

For N.E. 11th Avenue lying between the north line of N.E. Multnomah Street and the south line of N.E. Halsey Street

Location	Object to which attached
At the approximate intersection of the east line of N.E. 11th Avenue and the south line of N.E. Halsey Street.	On a pole
On the approximate east line of N.E. 11th Avenue approximately equidistant between the south line of N.E. Clackamas Street and the north line of N.E. Wasco Street.	On a pole
At the approximate intersection of the west line of N.E. 11th Avenue and the north line of N.E. Multnomah Street.	On a pole

For N.E. Clackamas Street lying between the west line of N.E. 15th Avenue and the east line of N.E. 9th Avenue excepting areas in intersections:

Location	Object to which attached
At the approximate intersection of the south line of N.E. Clackamas Street and the east line of N.E. 9th Avenue	On a stake
At the approximate intersection of the north line of N.E. Clackamas Street and the east line of N.E. 12th Avenue	On a pole
At the approximate intersection of the north line of N.E. Clackamas Street and the west line of N.E. 15th Avenue	On a pole

For N.E. Wasco Street lying between the west line of N.E. 15th Avenue and the east line of N.E. 9th Avenue excepting areas in intersections:

Location	Object to which attached
At the approximate intersection of the south line of N.E. Wasco Street and the east line of N.E. 9th Avenue	On a pole

At the approximate intersection of the north line of N.E. Wasco Street and the east line of N.E. 12th Avenue	On a stake
At the approximate intersection of the south line of N.E. Wasco Street and the west line of N.E. 15th Avenue	On a pole

For N.E. 10th Avenue lying between the north line of N.E. Multnomah Street and the south line of N.E. Halsey Street

Location	Object to which attached
At the approximate intersection of the north line of N.E. Multnomah Street and the west line of N.E. 10th Avenue	On a tree
On the approximate east line of N.E. 10th Avenue approximately equidistant between the north line of N.E. Wasco Street and the south line of N.E. Clackamas Street	On a pole
At the approximate intersection of the west line of N.E. 10th Avenue and the south line of N.E. Halsey Street	On a pole

For N.E. 12th Avenue lying between the north line of N.E. Wasco Street and the south line of N.E. Halsey Street

Location	Object to which attached
At the approximate intersection of the south line of N.E. Wasco Street and the east line of N.E. 12th Avenue	On a pole
At the approximate intersection of the west line of N.E. 12th Avenue and the south line of N.E. Clackamas Street.	On a pole
At the approximate intersection of the west line of N.E. 12th Avenue and the south line of N.E. Halsey Street	On a pole

For N.E. 12th Avenue lying between the north line of N.E. Halsey Street and the south line of N.E. Broadway, excepting area in intersections.

Location	Object to which attached
At the approximate intersection of the west line of N.E. 12th Avenue and the north line of N.E. Halsey Street	On a pole

Location	Object to which attached
At the approximate intersection of the west line of N.E. 12th Avenue and the south line of N.E. Weidler Street	On a pole
At the approximate intersection of the east line of N.E. 12th Avenue and the south line of N.E. Broadway	On a pole

For N.E. 13th Avenue lying between the north line of N.E. Multnomah Street and the south line of N.E. Halsey Street.

Location	Object to which attached
At the approximate intersection of the east line of N.E. 13th Avenue and the south line of N.E. Halsey Street	On a pole
On the approximate east line of N.E. 13th Avenue approximately equidistant between the south line of N.E. Clackamas Street and the north line of N.E. Wasco Street	On a stake
At the approximate intersection of the west line of N.E. 13th Avenue and the north line of N.E. Multnomah Street	On a pole

For N.E. 14th Avenue lying between the north line of N.E. Multnomah Street and the south line of N.E. Halsey Street.

Location	Object to which attached
At the approximate intersection of the east line of N.E. 14th Avenue and the north line of N.E. Multnomah Street	On a pole
On the approximate west line of N.E. 14th Avenue approximately equidistant between the north line of N.E. Wasco Street and the south line of N.E. Clackamas Street	On a pole
At the approximate intersection of the west line of N.E. 14th Avenue and the south line of N.E. Halsey Street	On a pole

WHEREAS said matter came on regularly for hearing on September 15, 1954, and no one appeared to object thereto and no objections or remonstrances nor any claim for damage were filed or made against the same, and

WHEREAS the Council finds that the petitions for said street vacations have been investigated by the City Engineer who recommends that the vacations be granted and subject to certain conditions, set forth in his report, and

WHEREAS the Council finds that the reason for these vacations is for general building purposes to be used in the development of a general retail business district and the development of an adequate parking area to support said district; that the Council further finds that in order to develop a large retail unit such as contemplated by Lloyd Corporation, Ltd., it is necessary to vacate the streets above mentioned, and

WHEREAS the Council finds that the vacation of the street area herein described will not injuriously affect the market value of the property abutting or affected by such vacations and it appears that said vacations will be in all respects for the public welfare, and it further appears that all things have been done as provided by law for the vacation of said street area and that final action should be now taken thereon and such vacations be made a matter of record, and

WHEREAS the Council finds that such vacations will be of material financial benefit to Lloyd Corporation, Ltd.; that it is contemplated in the future that additional street area will have to be opened in order to adequately take care of traffic congestion and ingress and egress to the Banfield Expressway when constructed; that said Lloyd Corporation, Ltd. has agreed to make future dedication of street area upon certain terms and conditions; now, therefore,

The City of Portland does ordain as follows:

Section 1. It is hereby ascertained and determined that said vacations will not injuriously affect the market value of any of the property abutting upon said street areas to

be vacated but will be beneficial thereto; that the consent of the owners of all the property adjacent or abutting the areas to be vacated has been obtained in writing duly acknowledged and filed as herein above stated; that notice has been duly and regularly had and the Council does now find that no objections or remonstrances were made or filed and that the public interest will not be prejudiced thereby but that said vacations will enhance the public interest and welfare; that the petitions for vacations should be granted with conditions as outlined in the City Engineer's report and as hereinafter set forth, all of which determinations hereby are made a matter of record.

Section 2. There hereby is vacated the following described property in the City of Portland, County of Multnomah, State of Oregon, to wit:

A. N.E. 11th Avenue lying between the present north line of N.E. Multnomah Street and a line 10.0 feet south of and parallel to the present south line of N.E. Halsey Street, when measured at right angles thereto

B. N.E. Clackamas Street lying between a line 20.0 feet east of and parallel to the present east line of N.E. 9th Avenue, when measured at right angles thereto, and the present west line of N.E. 10th Avenue

N.E. Clackamas Street lying between the present east line of N.E. 10th Avenue and the present west line of N.E. 11th Avenue;

N.E. Clackamas Street lying between the present east line of N.E. 11th Avenue and the present west line of N.E. 12th Avenue;

N.E. Clackamas Street lying between the present east line of N.E. 12th Avenue and the present west line of N.E. 13th Avenue;

N.E. Clackamas Street lying between the present east line of N.E. 13th Avenue and the present west line of N.E. 14th Avenue;

N.E. Clackamas Street lying between the present east line of N.E. 11th Avenue and the present west line of and parallel to the present west line of N.E. 15th Avenue, when measured at right angles thereto;

C. N.E. Wasco Street lying between a line 20.0 feet east of and parallel to the present east line of N.E. 9th Avenue, when measured at right angles thereto, and the present west line of N.E. 10th Avenue;

N.E. Wasco Street lying between the present east line of N.E. 10th Avenue and the present west line of N.E. 11th Avenue;

N.E. Wasco Street lying between the present east line of N.E. 11th Avenue and the present west line of N.E. 13th Avenue;

N.E. Wasco Street lying between the present east line of N.E. 13th Avenue and the present west line of N.E. 14th Avenue;

N.E. Wasco Street lying between the present east line of N.E. 14th Avenue and a line 10.0 feet west of and parallel to the present west line of N.E. 15th Avenue, when measured at right angles thereto.

D. N.E. 10th Avenue lying between the present north line of N.E. Multnomah Street and a line 10.0 feet southerly of and parallel to the present south line of N.E. Halsey Street, when measured at right angles thereto.

E. N.E. 12th Avenue lying between the present north line of N.E. Wasco Street and a line 10.0 feet south of and parallel to the present south line of N.E. Halsey Street, when measured at right angles thereto.

F. Northeast 12th Avenue lying between a line 10.0 feet northerly of and parallel to the present north line of Northeast Halsey Street, when measured at right angles thereto, and the present south line of N.E. Weidler Street; and

Northeast 12th Avenue lying between the present north line of Northeast Weidler Street and the present south line of Northeast Broadway Street.

G. N.E. 13th Avenue lying between the present north line of N.E. Multnomah Street and a line 10.0 feet south of and parallel to the present south line of N.E. Halsey Street, when measured at right angles thereto.

H. N.E. 14th Avenue lying between the present north line of N.E. Multnomah Street and a line 10.0 feet south of and parallel to the present south line of N.E. Halsey Street, when measured at right angles thereto.

Section 3. These vacations are contingent and dependent upon the following condition:

That nothing herein contained shall cause or require the removal of or abandonment of any sewer, water main, gas main, conduit of any kind, wire, pole, or thing used or intended to be used for any public service, and the right hereby is reserved for the owner of any such utility or thing to maintain, continue, repair, reconstruct, renew, replace, rebuild and/or enlarge any and all such things; that no building or structure of any kind shall be built or erected within a distance of ten feet from the center line of any such utility, except by written consent of the City Engineer and the owner of such utility first had; and that any and all contemplated building plans in said vacated area shall be submitted for approval to the City Engineer and to the Director, Bureau of Building In-

spections, to the end that such construction may be so adjusted with reference to all public utilities in said area as to cause a minimum amount of danger or inconvenience to the public and to the owner of such utility and to protect and preserve the same as presently constructed or hereafter reconstructed, renewed, replaced and/or enlarged, unless the petitioner shall agree with the utility owner involved to remove said utilities to a new location which removal shall be at the expense of the petitioner and subject to the prior approval of the City Engineer as to location and manner of removal and installation.

Section 4. These vacations are made upon the following agreements, which the petitioner Lloyd Corporation, Ltd. on behalf of itself, its successors and assigns agrees to keep and perform:

(a) In the event buildings providing a minimum of 850,000 square feet and off-street parking areas are not constructed by the petitioner or its successors and assigns in the area bounded on the south by N.E. Multnomah Street, on the east by N.E. 15th Avenue, on the north by N.E. Halsey Street and on the west by N.E. 9th Avenue, and in the area bounded on the south by N.E. Halsey Street, on the east by N.E. 13th Avenue, on the north by N.E. Broadway and on the west by N.E. 11th Avenue within five (5) years from the effective date of this ordinance, substantially in accordance with preliminary plans and drawings prepared by John Graham & Co., architects and engineers, designated Lloyd Center (with possible variations to meet needs of individual tenants for said buildings or as found desirable by the architects of Lloyd Corporation, Ltd.), then and in that event Lloyd Corporation, Ltd., its successors or assigns, shall dedicate for street purposes all of the street areas received by it resulting from the passage of this ordinance.

(b) Lloyd Corporation, Ltd., its successors or assigns, shall within fifteen (15) days after the beginning of the construction of the first building in the areas above described dedicate for street purposes the following areas to wit:

The following portions of Holladay's Addition to East Portland a duly recorded plat in the County of Multnomah and State of Oregon:

Lot	Area Sq. Ft.
S 10′ Lot 5, Blk 71	1000
N 10′ Lot 8, Blk 73	1000
S 10′ Lots 4&5, Blk 94	2000
S 10′ Lot 4, Blk 99	1000
W 10′ Lots 3&4, Blk 93	1000
E 10′ Lots 5, 6, 7&8, Blk 81	2000
E 10′ Lots 5, 6, 7&8, Blk 82	2000
W 20′ Lots 1, 2, 3&4, Blk 116	4000
W 20′ Lots 1, 2, 3&4, Blk 115	4000
W 20′ Lots 1, 2, 3&4, Blk 114	4000
N 10′ of Lot 8, Blk 113	1000
S 10′ of E 80′ Lot 4, Blk 114	800
W 20′ Lots 3&4, Blk 113	2000
N 10′ of E 80′ Lot 1, Blk 116	800
N 10′ Lot 8, Blk 116	1000
N 10′ Lot 1, Blk 117	1000
N 10′ W 90′ Lot 8, Blk 117	900
S 10′ W 90′ Lot 5, Blk 204	900
S 10′ E 90′ Lot 4, Blk 203	900
N 10′ E 90′ Lot 1, Blk 136	900
S 10′ Lot 5, Blk 203	1000
N 10′ Lot 8, Blk 136	1000
N 10′ Lot 1, Blk 137	1000

Lot	Area Sq. Ft.
N 10′ W 90′ Lot 8, Blk 137	900
S 10′ Lot 4, Blk 202	1000
S 10′ W 90′ Lot 5, Blk 202	900
S 10′ E 90′ Lot 4, Blk 201	900
S 10′ Lot 5, Blk 201	1000
N 10′ E 90′ Lot 1, Blk 156	900
N 10′ Lot 8, Blk 156	1000
S 10′ Lots 4&5, Blk 200	2000
N 10′ Lots 1&8, Blk 157	2000
E 10′ S 40′ Lot 8, Blk 157	400
E 10′ Lots 5, 6&7, Blk 157	1500
E 10′ Lots 5, 6, 7&8, Blk 158	2000
E 10′ Lots 6, 7&8, Blk 159	1500
E 10′ N 40′ Lot 5, Blk 159	400
S 10′ Lot 4, Blk 174	1000
W 10′ N 40′ Lot 4, Blk 174	400
W 10′ Lots 1, 2&3, Blk 174	1500
W 10′ N 34′ Lot 3, Blk 175	340
W 10′ S 16′ Lot 2, Blk 175	160
W 10′ Lots 1, 2, 3&4, Blk 176	2000
N 10′ E 90′ Lot 1, Blk 176	900

Lot	Area Sq. Ft.
E 10' N 40' Lot 5, Blk 200	400
E 10' Lot 6, Blk 200	500
W 10' S 36.41' Lot 4, Blk 199	364.1
W 10' N 32' Lot 3, Blk 199	320
W 10' Lot 2, Blk 228	500
W 10' S 40' Lot 1, Blk 228	400
S 10' E 90' Lot 4, Blk 199	900
S 10' W 90' Lot 5, Blk 199	900
E 10' Lots 5&6, Blk 199	1000
E 10' Lots 5&6, Blk 176	1000
E 10' Lots 5, 6, 7&8, Blk 175	2000
E 10' Lots 6&7, Blk 174	1000
E 10' N 40' Lot 5, Blk 174	400
W 10' N 40' Lot 4, Blk 179	400
W 10' Lots 1, 2&3, Blk 179	1500
W 10' Lots 2, 3&4, Blk 178	1500
W 30' Lots 2, 3&4, Blk 177	1500
W 10' Lots 3&4, Blk 198	1000
W 10' S 32' Lot 2, Blk 198	320
W 10' Lot 3, Blk 229	500
Total	74,304.1

(c) In the event buildings providing a minimum of 850,000 square feet and off-street parking areas are constructed by Lloyd Corporation, Ltd., its successors and assigns in the areas described in Section 4 (a) hereof, then Lloyd Corporation, Ltd., its successors or assigns, shall within five (5) years from the effective date of this ordinance dedicate for street purposes area of land now or hereafter owned by it in the vicinity of the streets herein vacated as may be agreed upon by the City Council and Lloyd Corporation, Ltd., for the extension of existing streets or for opening new streets for the purposes of providing proper access to the areas affected by these street vacations and to provide for the flow of traffic which will be diverted from the streets hereby vacated. The area of the land to be so dedicated when added to the area of the land described in Section 4 (b) hereof shall equal the area of the land vacated by this ordinance. Lloyd Corporation, Ltd., its successors and assigns hereby agrees that it will give its full cooperation in the im-

provement and construction of any such street or access way now or hereafter dedicated in the vicinity of the Lloyd Center and that it will not interpose any remonstrances to said improvement or construction.

Section 5. This ordinance shall be of no force and effect until the petitioner, Lloyd Corporation, Ltd., on behalf of itself, its successors and assigns shall have filed with the Auditor an acceptance in writing in form approved by the City Attorney.

Section 6. The Auditor shall file for record with the County Clerk who is ex-officio recorder of Multnomah County a certified copy of this ordinance as provided by law and like copies with the County Assessor and County Surveyor of said county, such recording to be at the expense of the petitioner.

Passed by the Council

Mayor of the
City of Portland

Attest

Auditor of the
City of Portland

Order of Council
10/13/54
DHB:gm

ORDINANCE NO. 101288

Passed by the Council, Nov. 10, 1954

/s/ Fred L. Peterson
Mayor of the
City of Portland

Attest:

/s/ Will Gibson
Auditor of the
City of Portland

ORDINANCE NO. 106640

Book 1865 page 440

An Ordinance amending Ordinance No. 101288, passed by the Council November 10, 1954, in order to provide for the substitution of certain parcels of property in Holladay's Addition to East Portland to be dedicated for street purposes by Lloyd Corporation, Ltd., in lieu of certain property now designated in Subsection (b) of Section 4 of Ordinance No. 101288, and declaring an emergency.

The City of Portland does ordain as follows:

Section 1. The Council finds that as one of the conditions of Ordinance No. 101288, passed by the Council November 10, 1954, Lloyd Corporation, Ltd. agreed to dedicate certain parcels of property in Holladay's Addition to East Portland in lieu of streets vacated by said ordinance; that said ordinance called for a twenty-foot dedication along the east side of N.E. 9th Avenue between N.E. Halsey and N.E. Holladay Street; that it was subsequently determined that in the interests of better planning ten feet should be dedicated on each side of N.E. 9th Avenue rather than twenty feet on the east side as called for in said ordinance; that said Lloyd Corporation, Ltd. offered to dedicate other parcels of equal area in lieu of the easterly ten feet of the twenty-foot strip; and that this substitution has the approval of the City Engineer and of the City Planning Commission; now, therefore, sub-section (b) of Section 4 of Ordinance No. 101288, passed by the Council November 10, 1954, entitled: "An Ordinance vacating, subject to conditions, all that portion of N.E. 11th Avenue lying between the north line of N.E. Multnomah Street and the south line of N.E. Halsey Street; all that portion of N.E. Clackamas Street lying between the west line of N.E. 15th Avenue and the

east line of N.E. 9th Avenue, excepting area in intersection; all that portion of N.E. Wasco Street lying between the west line of N.E. 15th Avenue and the east line of N.E. 9th Avenue, excepting certain area in intersections; all that portion of N.E. 10th Avenue lying between the north line of N.E. Multnomah Street and the south line of N.E. Halsey Street; all that portion of N.E. 12th Avenue lying between the north line of N.E. Wasco Street and the south line of N.E. Halsey Street; all that portion of N.E. 12th Avenue lying between the north line of N.E. Halsey Street and the south line of N.E. Broadway, excepting portions in intersection; all that portion of N.E. 13th Avenue lying between the north line of N.E. Multnomah Street and the south line of N.E. Halsey Street; and all that portion of N.E. 14th Avenue lying between the north line of N.E. Multnomah Street and the south line of N.E. Halsey Street, all in the City of Portland, Oregon," is hereby amended to read as follows:

(b) Lloyd Corporation, Ltd., its successors or assigns, shall within fifteen (15) days after the beginning of the construction of the first building in the areas above described dedicate for street purposes the following areas to wit:

The following portions of Holladay's Addition to East Portland a duly recorded plat in the County of Multnomah and State of Oregon:

Lot	Area Sq. Ft.	Lot	Area Sq. Ft.
S 10′ Lot 5, Blk 71	1000	*E 10′ of Lots 5&6, Blk 100*	*1000*
N 10′ Lot 8, Blk 73	1000	*E 10′ Lots 6, 7&8, Blk 99*	*1500*
S 10′ Lots 4&5, Blk 94	2000	*E 10′ N 40′ of Lot 5, Blk 99*	*400*
S 10′ Lot 4, Blk 99	1000	*E 10′ Lots 5, 6, 7&8, Blk 206*	*2000*
W 10′ Lots 3&4, Blk 93	1000	*E 10′ Lots 5&6, Blk 221*	*1000*
E 10′ Lots 5, 6, 7&8, Blk 81	2000	*W 10′ Lot 3, Blk 222*	*500*
E 10′ Lots 5, 6, 7&8, Blk 82	2000		
N 10′ of Lot 8, Blk 113	1000		

Lot	Area Sq. Ft.
W 10′ Lot 1, Blk 205	*500*
W 10′ N 26′ Lot 3, Blk 205	*260*
W 10′ Lots 3&4, Blk 113	*1000*
W 10′ Lots 1, 2, 3&4, Blk 114	*2000*
N 10′ of E 90′ Lot 1, Blk 116	*900*
S 10′ of E 90′ Lot 4, Blk 114	*900*
W 10′ Lots 1, 2, 3&4, Blk 115	*2000*
W 10′ Lots 1, 2, 3&4, Blk 116	*2000*
N 10′ Lot 8, Blk 116	1000
N 10′ Lot 1, Blk 117	1000
N 10′ W 90′ Lot 8, Blk 117	900
S 10′ W 90′ Lot 5, Blk 204	900
S 10′ E 90′ Lot 4, Blk 203	900
N 10′ E 90′ Lot 1, Blk 136	900
S 10′ Lot 5, Blk 203	1000
N 10′ Lot 8, Blk 136	1000
N 10′ Lot 1, Blk 137	1000
N 10′ W 90′ Lot 8, Blk 137	900
S 10′ Lot 4, Blk 202	1000
S 10′ W 90′ Lot 5, Blk 202	900
S 10′ E 90′ Lot 4, Blk 201	900
S 10′ Lot 5, Blk 201	1000
N 10′ E 90′ Lot 1, Blk 156	900
N 10′ Lot 8, Blk 156	1000
S 10′ Lots 4&5, Blk 200	2000
N 10′ Lots 1&8, Blk 157	2000
E 10′ S 40′ Lot 8, Blk 157	400
E 10′ Lots 5, 6&7, Blk 157	1500
E 10′ Lots 5, 6, 7&8, Blk 158	2000
E 10′ Lots 6, 7&8, Blk 159	1500
E 10′ N 40′ Lot 5, Blk 159	400
S 10′ Lot 4, Blk 174	1000
W 10′ N 40′ Lot 4, Blk 174	400
W 10′ Lots 1, 2&3, Blk 174	1500
W 10′ N 34′ Lot 3, Blk 175	340
W 10′ S 16′ Lot 2, Blk 175	160
W 10′ Lots 1, 2, 3&4, Blk 176	2000
N 10′ E 90′ Lot 1, Blk 176	900
E 10′ N 40′ Lot 5, Blk 200	400
E 10′ Lot 6, Blk 200	500
W 10′ S 36.41′, Lot 4, Blk 199	364.1
W 10′ N 32′ Lot 3, Blk 199	320
W 10′ Lot 2, Blk 228	500
W 10′ S 40′ Lot 1, Blk 228	400
S 10′ E 90′ Lot 4, Blk 199	900
S 10′ W 90′ Lot 5, Blk 199	900
E 10′ Lots 5&6, Blk 199	1000
E 10′ Lots 5&6, Blk 176	1000
E 10′ Lots 5, 6, 7&8, Blk 175	2000
E 10′ Lots 6&7, Blk 174	1000
E 10′ N 40′ Lot 5, Blk 174	400
W 10′ N 40′ Lot 4, Blk 179	400
W 10′ Lots 1, 2&3, Blk 179	1500
W 10′ Lots 2, 3&4, Blk 178	1500

Lot	Area Sq. Ft.	Lot	Area Sq. Ft.
W 10′ Lots 2, 3&4, Blk 177	1500	W. 10′ Lot 3, Blk 299	500
W 10′ Lots 3&4, Blk 198	1000		
W 10′ S 32′ Lot 2, Blk 198	320	Total	74,664.1

Section 2. Inasmuch as this Ordinance is necessary for the imemdiate preservation of the public health, peace and safety of the City of Portland in this: In order that the description of the properties to be dedicated as streets by Ordinance No. 101288 may be corrected without further delay, therefore, an emergency hereby is declared to exist and this Ordinance shall be in force and effect from and after its passage by the Council.

Passed by the Council Sept. 18, 1957

/s/ Terry D. Schrunk
Mayor of the
City of Portland

Attest:

/s/ Will Gibson
Auditor of the
City of Portland

Commissioner Bowes
September 6, 1957
OIN:rb

(SEAL) Document 35508 recorded Oct 4 1957 3:43 p.m.

M. S. COHN
County Clerk

PLAINTIFFS' EXHIBIT NO. 25

[Read by Andrew Koerner Cal 4076]

Northwest Office:
Portland
Oregon

Please Address
All Communications
to the Company

LLOYD CORPORATION, LTD.
(INCORPORATED IN CALIFORNIA)

9441 Olympic Boulevard—Corner Beverly Drive
Beverly Hills, California

Telephone BRadshaw 2-5335

September 10, 1954

To the Honorable Mayor and Council
of the City of Portland

Portland, Oregon

Gentlemen:

Lloyd Corporation, Ltd. has heretofore filed petitions for the vacation of the following streets in the City of Portland, Multnomah County, Oregon:

N. E. Wasco Street lying between the present east line of N. E. 9th Avenue and the present west line of N. E. 10th Avenue.

N. E. Wasco Street lying between the present east line of N. E. 10th Avenue and the present west line of N. E. 11th Avenue.

N. E. Wasco Street lying between the present east line of N. E. 11th Avenue and the present west line of N. E. 13th Avenue.

N. E. Wasco Street lying between the present east line of N. E. 13th Avenue and the present west line of N. E. 14th Avenue.

N. E. Wasco Street lying between the present east line of N. E. 14th Avenue and the present west line of N. E. 15th Avenue.

N. E. Clackamas Street lying between the present east line of N. E. 9th Avenue and the present west line of N. E. 10th Avenue.

N. E. Clackamas Street lying between the present east line of N. E. 10th Avenue and the present west line of N. E. 11th Avenue.

N. E. Clackamas Street lying between the present east line of N. E. 11th Avenue and the present west line of N. E. 12th Avenue.

N. E. Clackamas Street lying between the present east line of N. E. 12th Avenue and the present west line of N. E. 13th Avenue.

N. E. Clackamas Street lying between the present east line of N. E. 13th Avenue and the present west line of N. E. 14th Avenue.

N. E. Clackamas Street lying between the present east line of N. E. 14th Avenue and the present west line of N. E. 15th Avenue.

N. E. 10th Avenue lying between the present north line of N. E. Multnomah Street and the present south line of N. E. Halsey Street.

N. E. 11th Avenue lying between the present north line of N. E. Multnomah Street and the present south line of N. E. Halsey Street.

N. E. 12th Avenue lying between the present north line of N. E. Wasco Street and the present south line of N. E. Halsey Street.

N. E. 12th Avenue lying between the present north line of N. E. Halsey Street and the present south line of N. E. Weidler Street.

N. E. 12th Avenue lying between the present north line of N. E. Weidler Street and the present south line of N. E. Broadway.

N. E. 13th Avenue lying between the present north line of N. E. Multnomah Street and the present south line of N. E. Halsey Street.

N. E. 14th Avenue lying between the present north line of N. E. Multnomah Street and the present south line of N. E. Halsey Street.

The reasons for such vacations and the particular circumstances for the vacations are set forth in said petitions, namely: Lloyd Corporation, Ltd. is the owner of all of the property abutting upon the streets sought to be vacated and has prepared a comprehensive plan to construct retail store buildings on said property and to provide adequate parking area adjacent to said buildings. Said project is now commonly referred to as the Lloyd Center.

Lloyd Corporation, Ltd. hereby represents that it proposes to proceed to construct the buildings and establish off-street parking areas in substantial conformity with the preliminary plans and drawings prepared by John Graham and Company, Architects and Engineers, designated LLOYD CENTER (comprising four sheets designated "Plan at Mall Level," "Plan at Second Floor, Service Level," "Plan at Multnomah Street Level," "Plan at Intermediate Parking Level") in the area (1) bounded on the south by N. E. Multnomah Street, on the east by N. E. 15th Avenue, on the north by N. E. Halsey Street and on the west by N. E. 9th Avenue, and in the area (2) bounded on the south by N. E. Halsey Street,

on the east by N. E. 13th Avenue, on the north by N. E. Broadway and on the west by N. E. 11th Avenue.

The area of the streets sought to be vacated by said petitions is approximately 385,000 square feet. In consideration of your Honorable Body passing appropriate ordinances vacating said streets, as prayed for in said petitions, Lloyd Corporation, Ltd. hereby agrees:

1. Buildings providing for a minimum of 850,000 square feet described in the preliminary plans and drawings above referred to will be constructed and off-street parking areas established substantially in accordance with said plans which have been prepared by John Graham and Company, Architects and Engineers (with possible variations to meet the needs of individual tenants or as found desirable by the architects of Lloyd Corporation, Ltd.) within five years from the date said ordinances are passed. Should said buildings not be constructed and off-street parking areas not established within said period, then and in that event Lloyd Corporation, Ltd. hereby agrees that it will dedicate for street purposes all the street areas received by it as a result of the passage of said ordinances.

2. Lloyd Corporation, Ltd. hereby agrees to dedicate for street purposes the areas now owned by it, all located in Holladay's Addition to East Portland, now within the limits of the City of Portland, Oregon, described in Exhibit A attached hereto, within fifteen days after the beginning of the construction of the first building to be erected in Area No. (1) above described.

Lloyd Corporation, Ltd. recognizes that the vacation of said streets will be made upon the condition that the rights of the owners of any sewer, water main, gas main, conduit of any kind, wire, pole, or thing used for any public service which may be located in said streets to maintain, repair and replace the same, will be reserved

to such owners. Lloyd Corporation, Ltd. agrees that it will make the necessary arrangements with the owners of all of said utilities for the removal or relocation of any of the same, if such removal or relocation is required or desirable in connection with the development of Lloyd Center.

3. As Lloyd Center is hereafter constructed according to plans which have been prepared for such development, it will be necessary and desirable to open up new streets in the vicinity thereof; for example, extensions of N. E. 15th Avenue and N. E. 16th Avenue to connect with Lloyd Boulevard and/or Oregon Street; means of access to and egress from the projected Banfield Expressway in the vicinity of N. E. 16th Avenue both to the north and south of said Expressway; new approaches to N. E. 12th Avenue and N. E. Irving Street and/or N. E. Hoyt Street. Lloyd Corporation, Ltd. hereby agrees that it will dedicate for street purposes areas of land now or hereafter owned by it in the vicinity of Lloyd Center as may be agreed upon between the City Council and Lloyd Corporation, Ltd. for the extension of existing streets or for opening new streets for the purpose of providing proper access to Lloyd Center and the area in close proximity thereof, and to provide for the flow of traffic which will be diverted from the streets proposed to be vacated by said petitions, in an amount so that the total area thereof (when added to the areas of the parcels described in Exhibit A attached hereto) will equal the area of the land vacated by said petitions. These additional areas will be dedicated at such times as may be required and within a period of five years after the start of the construction of the first building in Area No. (1) above described.

There is attached hereto a certified copy of the resolution of the board of directors of Lloyd Corporation, Ltd.

authorizing the undersigned officers to sign this commitment.

Yours very truly,

LLOYD CORPORATION, LTD.
By /s/ [Illegible]
President

Attest:

/s/ [Illegible]
Assistant Secretary.

PLAINTIFFS' EXHIBIT NO. 26

July 28, 1954

From Dept. of Bureau of City Engineer

To Dept. of Public Works

Addressed to Commissioner Wm. A. Bowes

Subject Vacation of Certain Streets for the Proposed Lloyd Corporation, Ltd. Development

Dear Commissioner:

Under separate letters I have on this date returned the eight petitions of Lloyd Corporation, Ltd., for the vacation of certain streets, more particularly described in the petitions. In each instance I have recommended that the petition be granted in part only, and set forth the limits of the portions recommended for vacation. This was necessary since we have required Lloyd Corporation, Ltd. to dedicate sufficient properties to widen the perimeter streets of this proposed development to a width of 80 feet.

To avoid confusion and simplify these proceedings, this my written report on the proposed Lloyd development, should be considered a part of each of my reports on the above-mentioned petitions.

Upon investigating these proposed vacations, and after considering all phases of this project, it is recommended that the streets as shown in yellow on the attached map be vacated subject to the following conditions and restrictions:

1. That the 10 and 20 foot strips as shown in red on the attached map be dedicated as street for the widening of N.E. Multnomah Street, N.E. Halsey Street, N.E. 7th Avenue, N.E. 9th Avenue, N.E. 15th Avenue, and N.E. 16th Avenue.

2. That N.E. 9th Avenue, N.E. 15th Avenue, N.E. Halsey Street and N.E. Multnomah Street be widened by reconstructing the curbs and sidewalks adjacent to the Lloyd Tract to provide for an ultimate 60 foot roadway.

3. That N.E. 7th Avenue, N.E. 9th Avenue, N.E. Holladay Street, N.E. Multnomah Street and such other streets as are deemed necessary shall be widened by reconstructing the sidewalk and curb in accordance with the plans and specifications prepared by this office to provide for ultimate 60 foot roadway.

4. That the petitioner, Lloyd Corporation, Ltd., enter into an appropriate agreement with the City to insure the dedication and improvement of the proposed connecting street between N.E. Oregon Street and N.E. 16th Avenue, the proposed connection between N.E. 15th Avenue and N.E. Holladay Street, the interchange at N.E. 12th Avenue and N.E. Irving Street, and the in-and-off ramps for the Banfield Expressway.

Copies of the communications from the Portland Gas & Coke Company and the Bureau of Fire are attached. Our usual utility clause should be broad enough to protect their existing installations.

The street area recommended for vacation amounts to 385,000 square feet, or 8.838 acres, and the dedications to be made by the petitioner will in all probability be in excess of the area vacated.

In order to permit Lloyd Corporation, Ltd. to proceed with the detail planning of the project without undue

delay, it is recommended that the petitions be heard at the earliest possible date.

Yours very truly,

/s/ L. G. Apperson
L. G. APPERSON
City Engineer

OEA:fjn

PLAINTIFFS' EXHIBIT NO. 28

Aud. 99-175-120
4-65 2M

OFFICE OF
AUDITOR OF THE CITY OF PORTLAND
PORTLAND, OREGON 97204

Room 202
City Hall

COPY CERTIFICATE

STATE OF OREGON,)
County of Multnomah,) ss
CITY OF PORTLAND,)

I, RAY SMITH, Auditor of the City of Portland, do hereby certify that I have compared the following copy of Section 3-407, SPECIAL PATROLMENT OR POLICEMEN, of Ordinance No. 77780, passed by the Council September 3, 1942, as in force and effect from date of passage to date of certification, with the original thereof, and that the same is a full, true and correct copy of such original SECTION 3-407, ADMINISTRATION CODE and of the whole thereof as the same appears on file and of record in my office, and in my care and custody.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of the City of Portland affixed this 6th day of November, 1969.

/s/ Ray Smith
Auditor of the
City of Portland

By /s/ Edna M. Cervera
Deputy

[SEAL]

nor shall any member, directly or indirectly, interest himself or interfere in any manner whatever in the employment of any attorney to aid in the defense of any person arrested or accused; for any violation of either of the foregoing provisions the person so offending shall be immediately removed from the police force.

Upon complaint of any person alleging a violation of this section the council shall summon the officer accused before it and shall hold a summary hearing with power to subpoena witnesses and to compel the production of all necessary evidence; and if it finds that a violation of this section has been committed by such officer he shall immediately be dismissed from the force and shall be ineligible for reappointment. [Ch. 1903, sec. 185; ch. ord. 1928, rev. sec. 45.]

Section 3-407. SPECIAL PATROLMEN OR POLICEMEN.

The Council is hereby authorized to appoint persons of suitable character as special patrolmen or policemen, but such special policemen shall not be paid by the city for their services as policemen. They shall serve during the pleasure of the Chief of Police. They shall observe the rules of deportment and conduct applicable to regular patrolmen. They shall, in the performance of their duties, be subject to the orders of commanding officers and must report at such intervals as shall be required. They shall, at all times, cooperate with regular patrolmen in the performance of their duties. [Ch. 1903, sec. 186, ch. ord. 1928 rev., sec. 46, as amended by Ordinance No. 77612 passed July 30, 1942.]

Section 3-408. DUTIES OF POLICE FORCE.

The police force of the City of Portland shall at all times of the day and night within the boundaries of said city preserve the public peace, prevent crime, arrest

offenders, protect rights of persons and property, guard the public health, preserve order, remove nuisances existing in streets, roads, public places, and highways, report all leaks or other defects in water pipes and sewers, and street lights not burning to the proper authorities, provide a proper force at every fire in order that thereby the firemen and property may be protected, protect strangers and travelers at the steamboat and ship landings and railroad stations, and generally obey and enforce all ordinances of the city council and criminal laws of the state and of the United States. [Ch. 1903, sec. 189; ch. ord. 1928, rev. sec. 49.]

Section 3-409. COUNCIL IN EMERGENCY TO APPOINT TEMPORARY EMPLOYES.

The Council in case of any mob, riot, pestilence, or on days of public demonstration may appoint such temporary policemen as it may deem necessary, who shall have all the powers and perform all the duties of regular policemen. Such appointments shall not continue beyond the emergeney. [Ch. 1903, sec. 192; ch. ord. 1928, rev. sec. 51.]

DEFENDANT'S EXHIBIT NO. 52

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 69-127

[Filed Jun. 18, 1969, Donald D. Sullivan, Clerk, by /s/ J. Smith, Deputy]

DONALD M. TANNER, BETSY WHEELER, and SUSAN ROBERTS,

Plaintiffs,

vs.

LLOYD CORPORATION, LTD.,

Defendant.

Taken June 3, 1969, at Portland, Oregon

Deposition of BETSY WHEELER, one of the plaintiffs, a witness of lawful age, taken on behalf of the defendant, in the above entitled cause, pursuant to stipulation hereinafter set forth, before Harry L. Libby, Official Court Reporter for the Circuit Court of the State of Oregon, County of Multnomah, on Tuesday, June 3, 1969, Eleventh Floor of the Loyalty Building, Portland, Oregon.

* * * *

[14] [BY MR. MILLER:]

Q What did you do after you began distributing the leaflets?

A Well, we walked around distributing until we were told we could not do that inside, and we asked where we could do it, and they said outside, and we went to the west side and distributed on the sidewalk outside as people were coming in from the parking lot to go in. We

did that for awhile and then we went to the restaurant and distributed some there and went back again, and we were confronted again by the Security Guard as we were distributing and distributed some more on the sidewalk and left, going, distributing on the way, again confronted and eventually left.

Q What restaurant did you go to?

[15] A The one by the skating rink.

* * * * *

[19] Q How many leaflets did you bring with you when you came there?

A I have no idea.

Q Did you get rid of all of them while you were there?

A Most of them.

Q Where did you go from—did you go from Halsey Street sidewalk to the restaurant?

A Yes.

Q Is that the first place you went after you left the Halsey Street sidewalk?

A Yes.

Q Where did you go when you left the restaurant?

[20] A Back to Halsey Street again.

Q And by that time had you been encountered only once by the security officer?

A Except they were concealing, following us, and we were waving to them and talking to them.

Q Were you or did you attempt to go anywhere near the ice rink to distribute leaflets again after you went to the restaurant?

A On the way, or on the way out of distributing?

Q On the way out from the restaurant?

A No. From Halsey Street on the way home, and also on the way back from the restaurant to Halsey Street we passed them out.

* * * * *

DEFENDANT'S EXHIBIT NO. 54

November 26, 1968

Donald McLaren Tanner
906 SE Ankeny
Portland, Oregon Age: 25

PHONE: 232-5562

On November 14, 1968, I was at Lloyd Center shopping Center in Portland, Oregon. I was standing on the sidewalk in front of the Meier and Frank Department Store, passing out literature which invited the public to a service that evening at Centenary Wilbur Church.

At approximately 11:00 a.m. I was approached by a security guard. He requested that I leave, stating that the Lloyd Center allowed no one to pass out literature within the Center. He informed me that leafletting was permitted only on the sidewalks next to public streets.

I then contacted Jeff Blakly, the organizer of the leafletting, who contacted Mrs. Deinum of the ACLU. She stated that she had contacted the Lloyd Center management earlier in the day and informed them that she thought we had the right to leaflet inside the Center.
I then returned to my position in front of the Meier and Frank store. At approximately 11:30 a.m. another security guard approached me and requested that I leave. I informed him that a representative of the ACLU had told the manager that I had the right to leaflet inside the Center. The guard said that we should talk to the manager and I accompanied him to the manager's office. The manager was not there, but the Chief of security stated that Lloyd Center was private property and that if I persisted he would request the Portland Police to arrest me for trespassing. If I did not tell him my name

and persisted, he said that he would put out a warrant for a John Doe arrest.

I left the office and proceeded to a phone for the purpose of contacting the ACLU. Before I made the call, the second security guard approached me with a man he introduced as Mr. Horn, the manager of Lloyd Center.

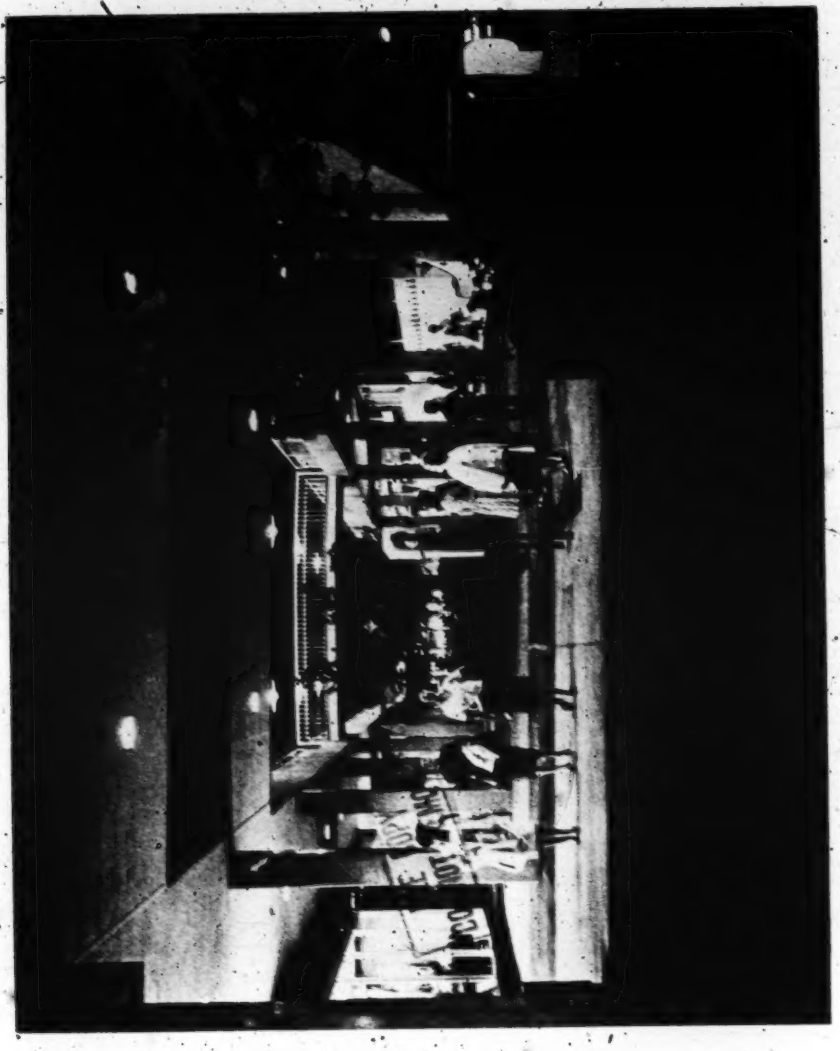
Mr. Horn repeated the statements of the security chief, stating that Lloyd Center is private property and that if I persisted in leafletting, he would have the Portland Police arrest me for trespassing. I stated that I did not think the sidewalks within Lloyd Center were private property. He said that he thought that they were, but that a court would have to decide. He repeated that if I persisted in leafletting, he would have me arrested. I then called the ACLU and Mrs. Deinum said she would call the Lloyd Center manager.

Later that afternoon I called Mrs. Deinum to obtain the results of her conversation. She said that if I returned to leaflet, I would probably be arrested. Also ACLU would be unable to post bond, but they would defend me at a hearing, although they were not really ready at that time. I did not return to Lloyd Center.

Signed: Donald McLaren Tanner
DONALD MCLAREN TANNER

November 26, 1968
Date

DEFENDANT'S EXHIBIT NO. 55A



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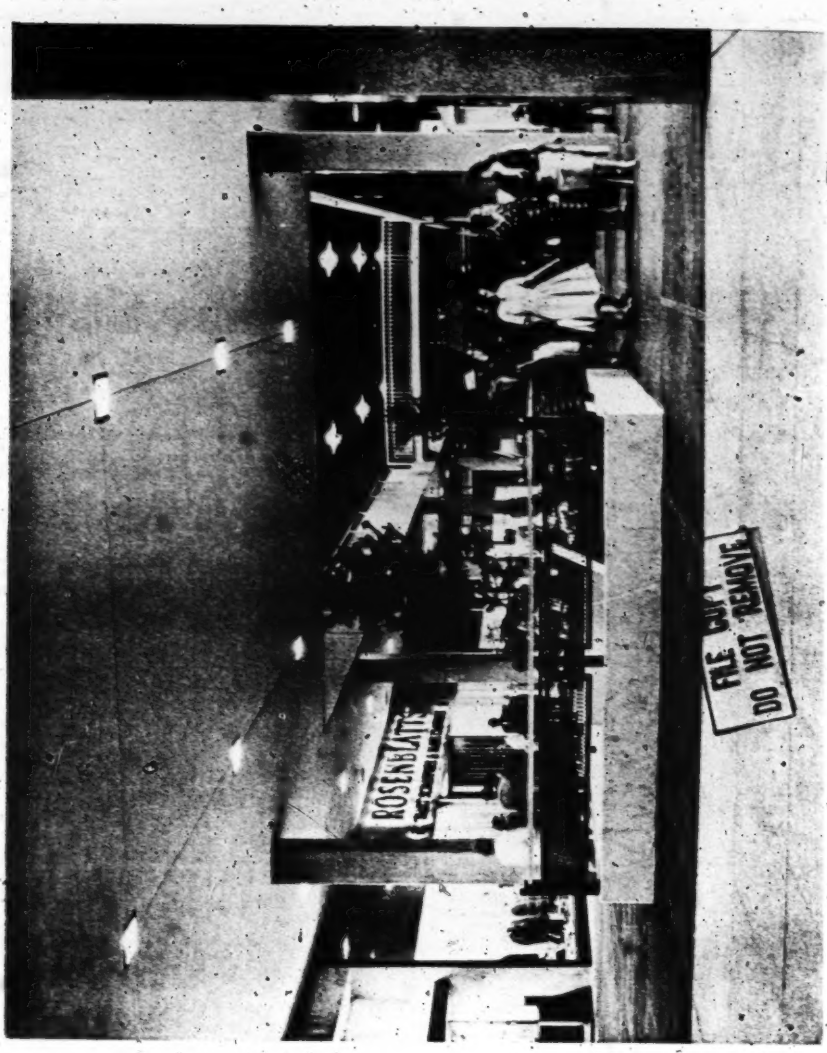

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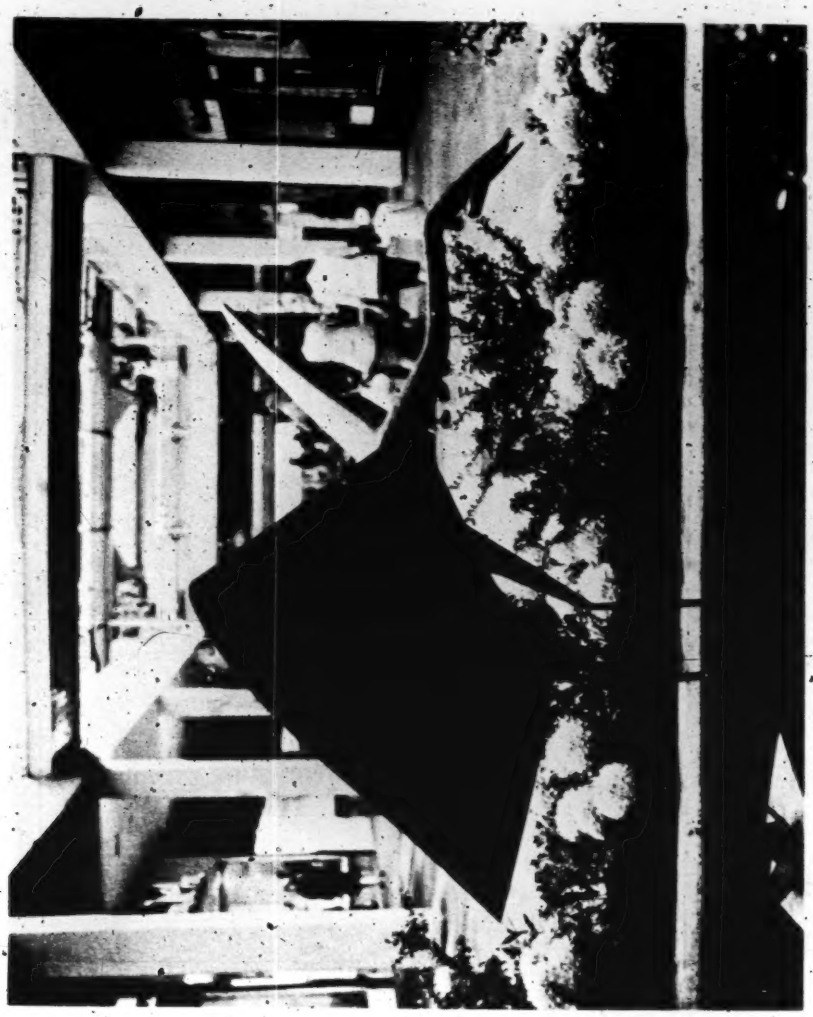
DEFENDANT'S EXHIBIT NO. 55D



Defendant's Exhibit No. 55A-V

234

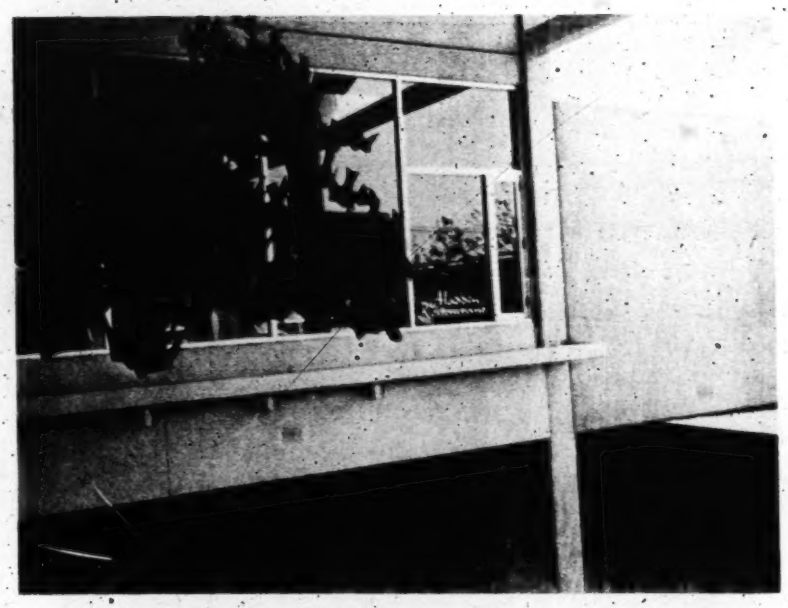
DEFENDANT'S EXHIBIT NO. 55E-F

DEFENDANT'S EXHIBIT NO. 55G-H

Defendant's Exhibit No. 55A-V

236

DEFENDANT'S EXHIBIT NO. I-J



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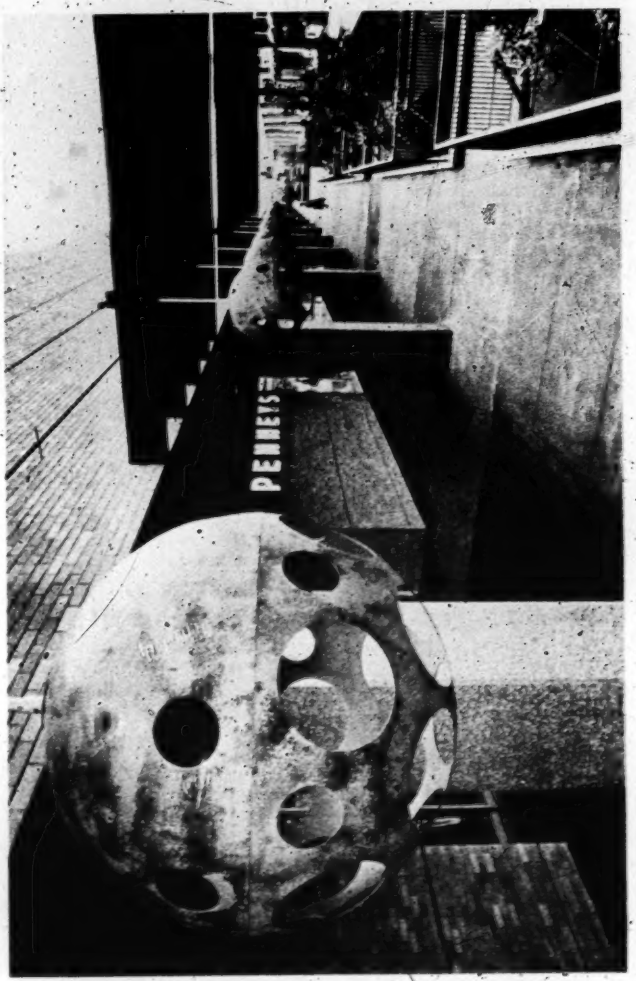
DEFENDANT'S EXHIBIT NO. 55M

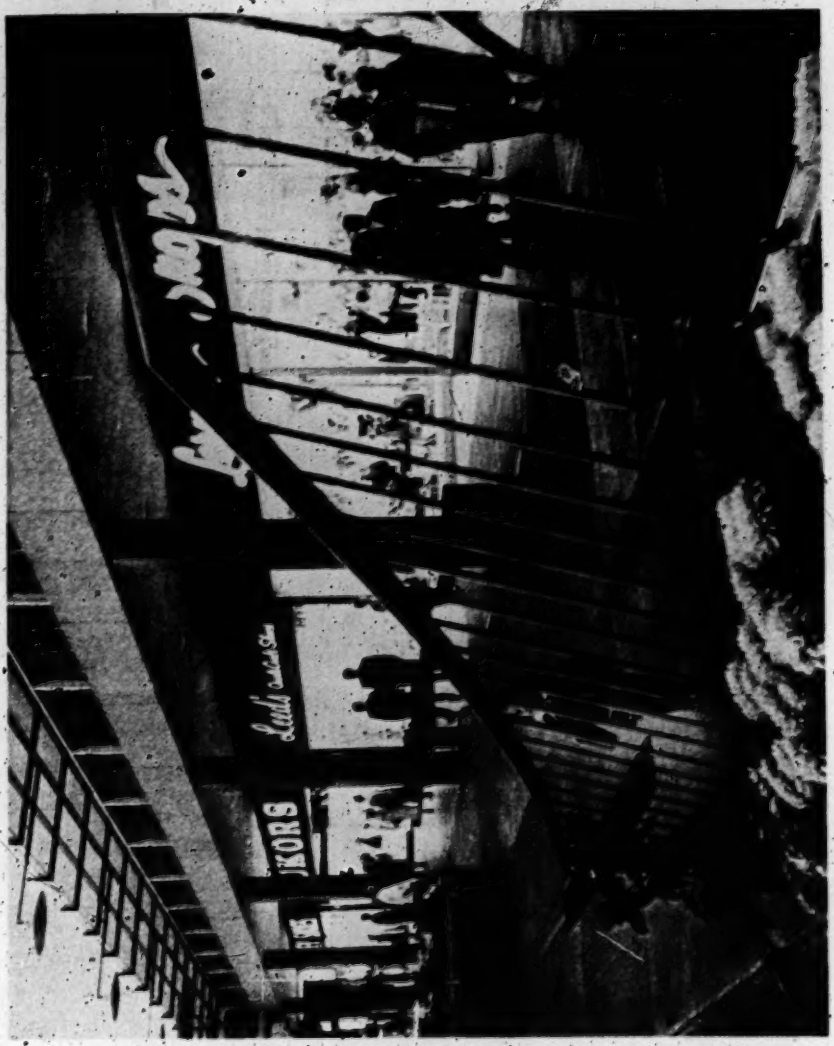


DEFENDANT'S EXHIBIT NO. 55N

Defendant's Exhibit No. 55A-V

240

DEFENDANT'S EXHIBIT NO. 550



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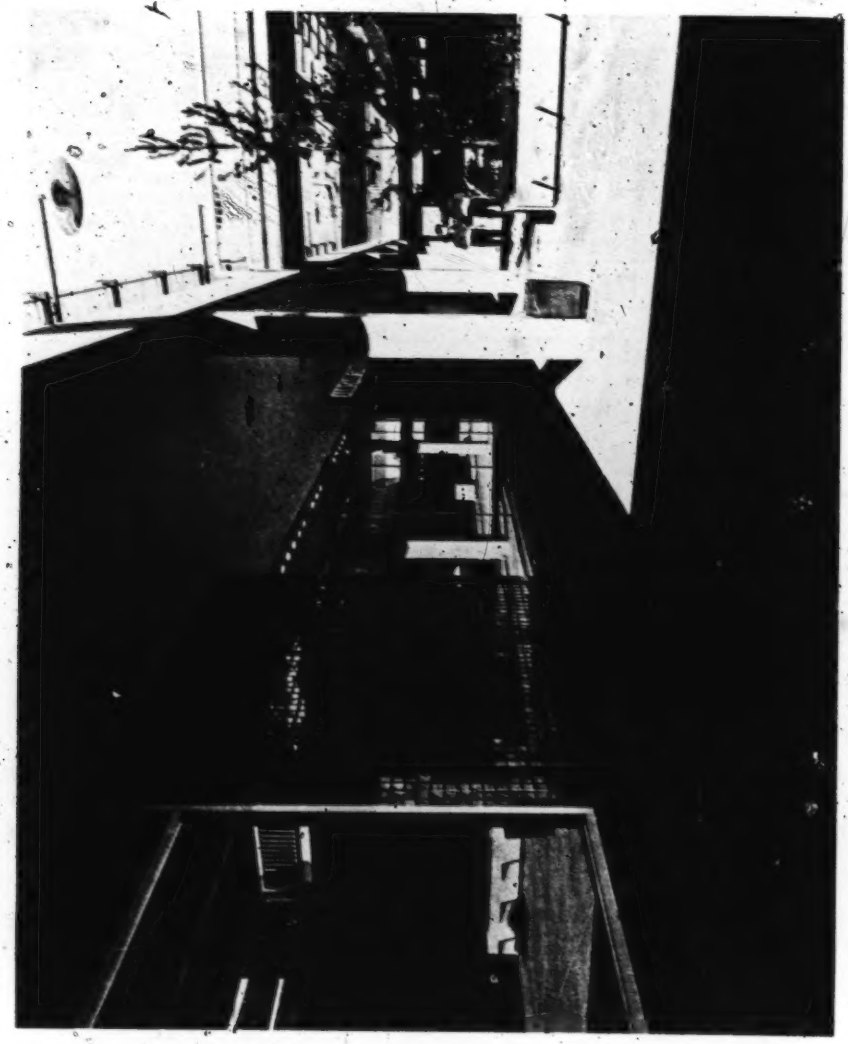

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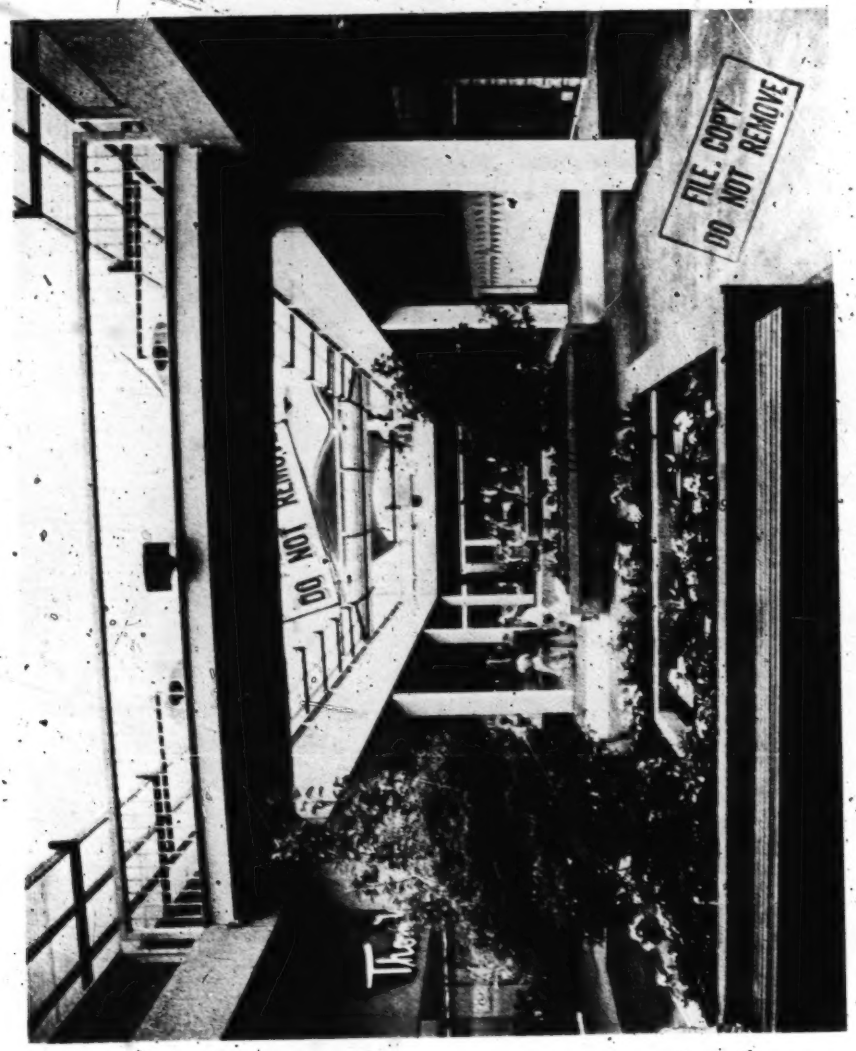

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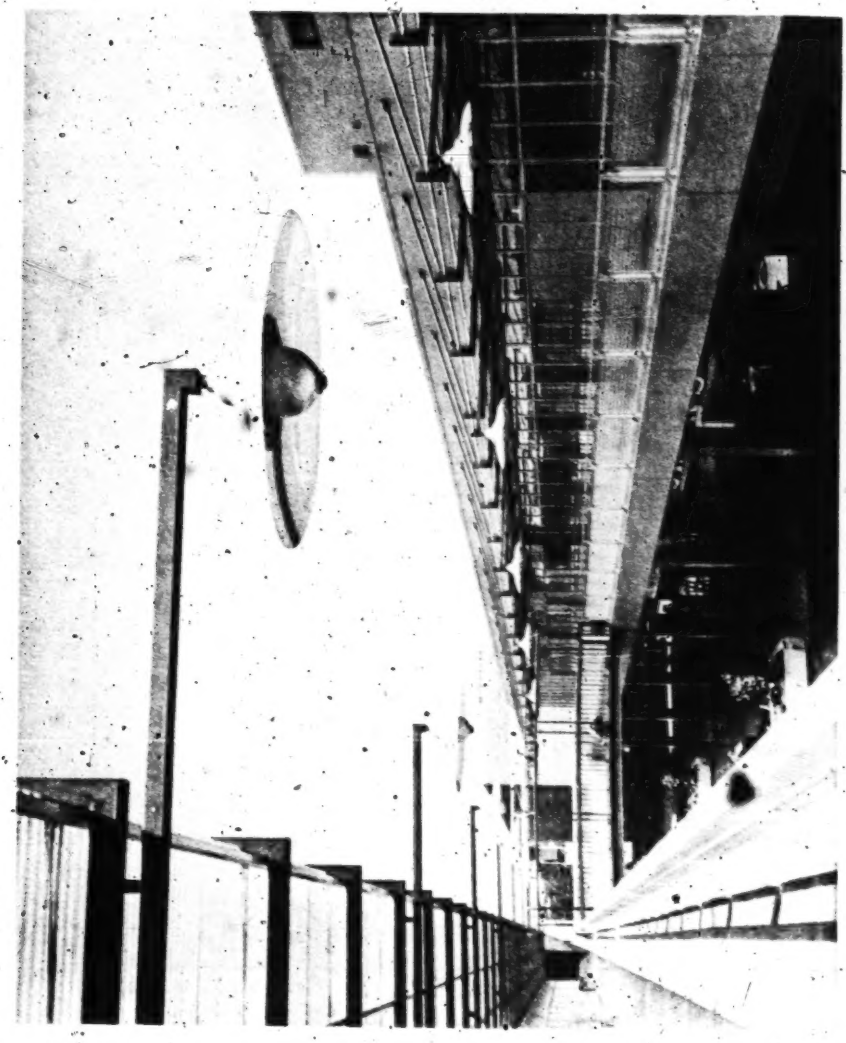

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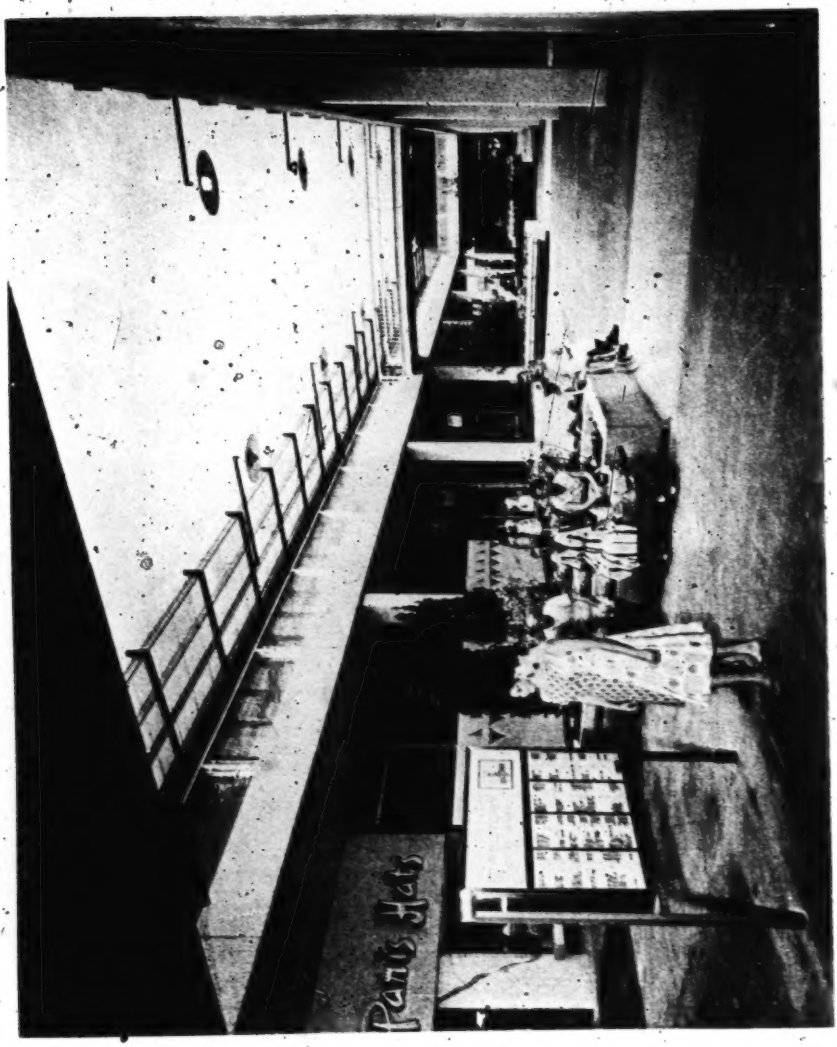

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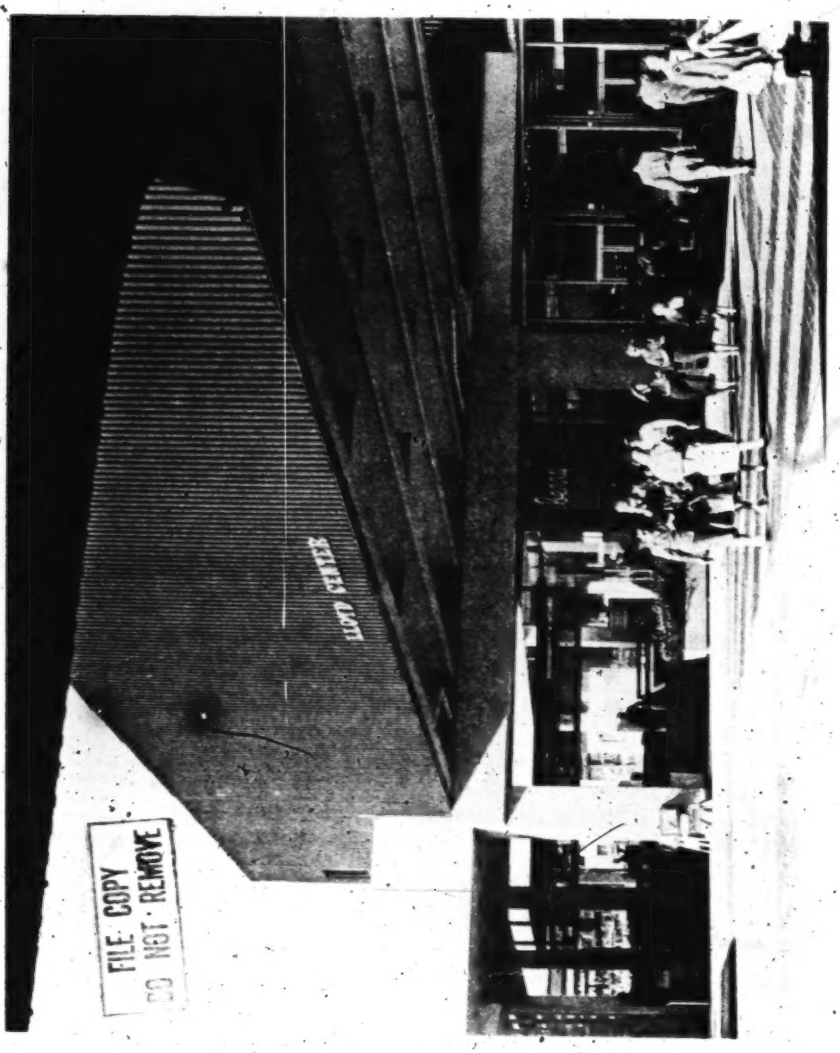
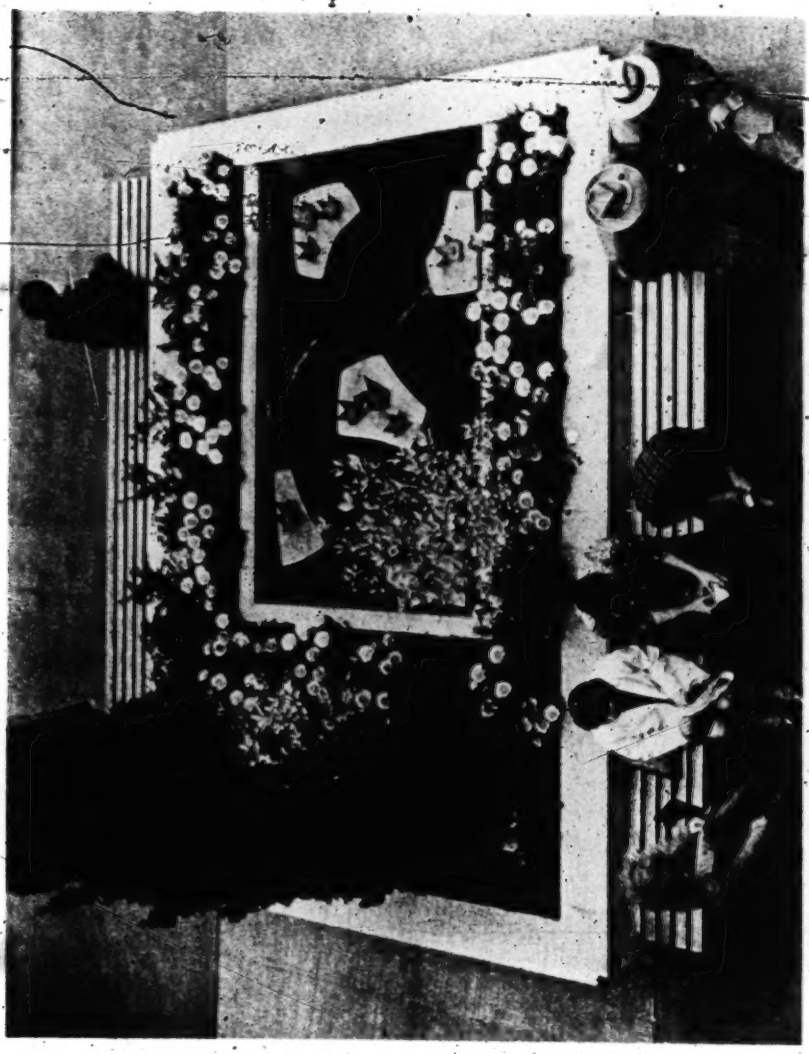


DEFENDANT'S EXHIBIT NO. 55U

DEFENDANT'S EXHIBIT NO. 55V



DEFENDANT'S EXHIBIT NO. 56

ARTICLE 12. COMMON AREAS—DEFINITION; OPERATION; RIGHT OF WAY:

a. The term "common areas" means all areas in the Center other than commercial areas and improvements intended for renting, including but not limited to parking lots, decks and ramps, streets, curbs, sidewalks, subways, roadways, passageways, loading platforms, malls, parkways, corridors, garden courts, culverts, tunnels, utility and sewer lines, landscaping, drainage, lighting facilities, policing facilities, signs, customers' facilities including washrooms, comfort rooms, lounges, drinking fountains, toilets, stairs, ramps, escalators, elevators, shelters, porches, bus stations and any and all other areas, buildings, improvements, facilities and appurtenances used or intended to be used from time to time in common by or for tenants of the Center or by customers or invitees of such tenants.

b. Landlord shall, at Landlord's sole cost and expense, except for Tenant's proportionate share thereof as hereinafter provided, maintain, control, manage and operate the common areas in a reasonable and proper manner as Landlord may from time to time deem efficient and appropriate for the best interests of the Landlord and the tenants of the Center.

c. Tenant shall pay to Landlord upon demand but not oftener than once each calendar month as additional rent (which additional rent may be estimated by Landlord subject to adjustments in future billings to Tenant) Tenant's proportionate share of all costs and expenses of operation and maintenance of said common areas, including but not limited to lighting, heating, insurance, cleaning, snow removal, painting, policing, gardening and

landscaping and maintenance including but not limited to such repair of paving, curbs, walkways, driveways, landscaping and drainage and lighting facilities as may be from time to time necessary to keep the same in good condition and repair, determined by the ratio which the floor area of the demised premises bears to the total of the floor area from time to time occupied by all other tenants in the Center. Such costs shall not include real estate taxes, special assessments, or depreciation of the original investment, except as provided in paragraph e of this Article. Such operating and maintenance cost and expense shall be computed on an annual basis under generally accepted accounting principles. On or before March 31 of each year Landlord shall determine and furnish to Tenant a statement showing in reasonable detail the cost and expense of maintaining said common areas during the preceding calendar year. To the extent Tenant's proportionate share of said costs and expenses is greater or less than the sum actually billed to and paid by Tenant therefor during said year, the difference shall be billed or refunded as the case may be.

"Floor area" means, with respect to each building in the Center and the demised premises, the actual number of square feet of rentable floor space within the exterior faces of the exterior walls (except party walls as to which the center thereof instead of the exterior face thereof shall be used) of all floors, first basements and sidewalk subspaces or parts thereof within the exterior limits of each of said buildings and the demised premises, but there shall not be included space on the roofs or penthouses or other structures on roofs unless used as selling space. No deduction or exclusion shall be made from floor area by reason of columns, stairs, elevators, escalators, or other interior construction or equipment. Changes in any particular floor area occurring during any calendar month shall be effective on the first day of the next succeeding calendar month.

In the event Landlord shall at any time during the term of this lease construct a hotel, office building or other building used predominantly for non-retail purposes on the area between N. E. 13th Avenue and N. E. 16th Avenue, south of N. E. Multnomah Street, such hotel, building or buildings together with portions of such areas as may be adequate to provide parking for the tenant or tenants of said hotel, building or buildings shall be excluded from the Center for the purpose of this paragraph c of Article 12.

d. Landlord reserves the right to promulgate from time to time such reasonable rules and regulations relating to the use of the common areas and any part of parts thereof as Landlord may deem expedient and for the best interests of the tenants of the Center, and Tenant agrees to abide by such rules and regulations and to cooperate in the observance thereof. Said rules and regulations shall be binding upon Tenant upon delivery of a copy thereof to Tenant in the manner required for delivery of notice under Article 41 of this lease.

e. Landlord may require the payment of a fee or charge for the use of the parking areas, or a portion thereof, which may be by meter or otherwise. The revenue so derived (after expenses of collection) shall first be applied to taxes and assessments levied against the common area, and depreciation thereon, and any excess thereafter shall be applied to costs and expenses of operation and maintenance as defined in paragraph c of this Article, before apportionment of said costs and expenses among the tenants. Any further excess shall be retained by Landlord. If taxes and assessments are not separately assessed on or apportioned to the common areas by the tax assessor, Landlord shall fairly apportion them.

f. During the term hereof Tenant, its employees, customers and invitees, subject to the provisions of Article

4, Article 17, paragraph d, and to such reasonable rules and regulations as Landlord shall make from time to time, shall have the continuous right to use jointly with others the common areas except for those portions thereof which are used for maintenance and service of the Center.

g. Landlord, if it deems necessary in order to prevent the acquisition of public rights, may from time to time temporarily close all or any portion of the common areas, erect private boundary marks or take such action as may be reasonably appropriate for that purpose.

h. Subject to the provisions of paragraph f of this Article 12, all common areas which Tenant may be permitted to use are to be used under a revocable license, and if the amount of such areas be diminished, obstructed or changed, Landlord shall not be subject to any liability nor shall Tenant be entitled to any compensation or diminution or abatement of rent, nor shall such diminution of such areas be deemed constructive or actual eviction.

DEFENDANT'S EXHIBIT NO. 59

RESOLUTION

WHEREAS the members of this Association are interested in the maintenance of the malls and parking lots of the Lloyd Center in a clean, attractive condition, permitting the orderly and unobstructed use thereof by the customers and prospective customers of members, free from noise and other annoying or distracting factors, and

WHEREAS said members believe that the selling of merchandise, solicitations, distribution of literature, group or individual demonstrations, political campaigning (except by special invitation of the Center), loitering and other similar activities in and around the malls and parking lots in Lloyd Center, annoy the customers of Association members and increase the cost of maintenance and of measures of security, and are detrimental to the interests of the members and their businesses and the welfare of their customers and prospective customers, and

WHEREAS although Lloyd Corporation has been notified generally from time to time by individual members of their said desires in this matter, it is advisable to again call it to the Lloyd Corporation's attention,

NOW, THEREFORE, it is RESOLVED that, forthwith, Lloyd Corporation be advised again of the interests and desires of this Association and its members, as hereinabove evidenced, and that it be requested to take and continue to take all steps which it can lawfully and properly take and continue to take to prevent the occurrences mentioned herein.

By vote of the Lloyd Center Merchants Association at its annual meeting held in the Lloyd Center Auditorium this 11th day of February, 1969.

/s/ Robert W. Leigh
President

/s/ William E. Wood
Secretary

DEFENDANT'S EXHIBIT NO. 60

[Written Statement of Architectural Expert]

The design objective for a modern shopping facility is to create the most effective device for merchandising possible with the resources available.

In order to make shopping easy and pleasant, and to help realize the goal of maximum sales, the shops are grouped about special pedestrian ways or malls. Here the shopper is isolated from the noise, fumes, confusion and distraction which he normally finds along city streets, and a controlled, carefree environment is provided to entice him to "linger longer and purchase more."

This means that the appearance of the buildings housing the shops, and the mall finishes, landscaping, sculpture, fountains, and other amenities, must be interesting and pleasant, but not spectacular and thus distracting. In short, the malls must be somewhat of a place of escape and refuge from worries and pressures of the everyday world. To this end, the designer utilizes sculpture which is humorous, abstract, and non-controversial in implication, or is based upon natural subjects such as birds and fish, simplified in form. Colors and landscaping designs are coordinated, and limitations are placed upon tenant shop front design and signing. A public address system is provided throughout for purposes of broadcasting "light and carefree" music.

Supreme Court of the United States

No. 71-492 ---*October Term*, 19

Lloyd Corporation, Ltd,

Petitioner,

v.

Donald M. Tanner et al.

ORDER ALLOWING CERTIORARI. Filed January 17 ---------- , 19 72.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth ---------- Circuit is granted.

FILE COPY

OCT 5 1971

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-492

LLOYD CORPORATION, LTD.,
Petitioner,

v.

DONALD M. TANNER, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE BLACK, JR.
ROBERT J. MILLER
BLACK, KENDALL, TREMAINE, BOOTHE & HIGGINS
520 S.W. Sixth Avenue
Portland, Oregon 97204

JOHN H. PICKERING
WILMER, CUTLER & PICKERING
900 17th Street, N.W.
Washington, D. C. 20006

Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

LLOYD CORPORATION, LTD.,
Petitioner,

v.

DONALD M. TANNER, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Lloyd Corporation, Ltd. prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on July 7, 1971, affirming the judgment of the United States District Court for the District of Oregon entered January 27, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported. The opinion of the District Court is reported as *Tanner v. Lloyd Corporation, Ltd.*, 308 F. Supp. 128 (D. Ore. 1970). The opinions are reprinted in the Appendix commencing on pages 2a and 6a, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered July 7, 1971. This Court has jurisdiction to review the judgment by Writ of Certiorari under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Does the First Amendment require the petitioner, as the owner of a shopping center, to open its land to all noncommercial handbilling even though the purpose of the handbilling is not related to the petitioner's use of the land or to any activity being conducted thereon, and use of the petitioner's land is not necessary to accomplish the purpose of the handbilling?

In the event this petition is granted, the petitioner reserves the right to argue two further questions, *i.e.*, whether a private land owner's threat to cause an arrest for trespass on his land is state action within the meaning of the Civil Rights Act, and, if it is, whether the District Court should have abstained from interfering with enforcement of state trespass law in this case where there was no bad faith, no irreparable harm and no arrest, even though one respondent continued to handbill on the petitioner's land after being asked to stop.[1]

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[1] *See Watkins* v. *Oaklawn Jockey Club*, 183 F.2d 440 (8th Cir. 1950), holding that action by employees of a private company (who were also police officers) was not state action. If state action is involved, the trial court should not have decided this case because the national policy stated in *Douglas* v. *City of Jeanette*, 319 U.S. 157 (1943), and restated in *Cameron* v. *Johnson*, 390 U.S. 611 (1968), is that in the absence of irreparable harm or bad faith, federal courts should abstain from interfering with the enforcement of state law. *See also Samuels* v. *Mackell*, 401 U.S. 66 (1971); *Younger* v. *Harris*, 401 U.S. 37 (1971); *Boyle* v. *Landry*, 401 U.S. 77 (1971).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment I.

"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment V

"No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

Statutes

Oregon Revised Statutes § 164.460. Entry on lands and refusal to depart; what constitutes inclosure.

"(1) Any person, other than an officer on lawful business, who goes or trespasses upon any inclosed lands or premises not his own, and upon verbal, written or printed notice of the owner or person in lawful occupation of the lands or premises fails or refuses to depart therefrom immediately and remain away until permitted to return, shall be punished upon conviction of a fine of not more than $50."

Portland City Ordinance § 16-613. Trespass.

"(a) It is unlawful for any person other than an officer on lawful business wilfully to trespass upon or damage any real or personal property of another.

"(b) It shall be deemed a trespass under this section to enter or be upon any enclosed real property without the consent, express or implied, of the owner or lawful occupant of the real property.

"(c) It shall be deemed a trespass under this section to enter or be upon any real property not enclosed when upon oral, written or printed notice of the owner or lawful occupant of the real property, the person entering or being thereon fails or refuses to depart therefrom immediately and remain away until permitted to return."

STATEMENT OF THE CASE

The petitioner, Lloyd Corporation, Ltd., owns the land and buildings that are used as a shopping center in an area known as Lloyd Center in Portland, Oregon. The respondents are three individuals who sought to distribute handbills promoting what they called "National Draft Card Turn-In Day" on the petitioner's private property.

On November 14, 1968, the petitioner received a telephone call from the American Civil Liberties Union advising that handbillers would appear on the petitioner's land and that the Portland police had been notified. The following is an excerpt from the agreed facts in the court's Pre-trial Order, describing the incident:

> "On November 14, 1968, a number of persons, including the plaintiffs, distributed to passersby at various points upon the malls and walkways of the privately owned property of defendant in Lloyd Center, certain anti-war leaflets . . . . Such distribution of literature occurred without permission of the defendant. Security officers employed by the defendant told the plaintiffs and the others so distributing leaflets to cease such distribution on and from the privately owned property of the defendant in Lloyd Center, and that if they desired to make further distribution, to make such distribution from the public streets and sidewalks in the center. Employees of the defendant advised the plaintiffs that if they did not cease distribution from the privately owned portions of Lloyd Center, they would be subject to arrest. Such distribution was then continued by the plaintiffs and others from the public streets and side-

walks in Lloyd Center. No arrests were made and no warrant for arrest was requested or applied for by defendant."

On March 7, 1969, the respondents filed a Complaint in the United States District Court for the District of Oregon asking for an injunction and a declaratory judgment. They alleged that the petitioner had acted under state statute and municipal ordinance to deprive them of constitutional rights by refusing to give them permission to distribute their handbills on the petitioner's private shopping center land. They alleged that the petitioner had a policy prohibiting noncommercial handbilling on its private property and that the federal court had jurisdiction by virtue of the Civil Rights Act (42 U.S.C. § 1983 and 28 U.S.C. § 1343(3)).

The petitioner admitted that it had always prohibited handbilling on its land (even by its own tenants), with the single exception that after this Court's decision in *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), it did not prohibit handbilling that was a criticism of or was otherwise directly related to the petitioner's or its tenants' use of the land.

At the trial, the following facts were established by stipulation or uncontroverted testimony.

The petitioner's shopping center contains stores, buildings, malls, walkways and open and covered areas for automobile parking. There are no residences or overnight accommodations in Lloyd Center. No one lives there. There are sixty-six linear blocks of publicly owned sidewalks and a public park that are inside Lloyd Center. Some of the stores open directly onto the public sidewalks, some open onto the interior privately owned malls and some stores open onto both. This case concerns only the property that is privately owned by the petitioner in Lloyd Center. All parties agree that the respondents have the right to handbill on the public sidewalks and in the public park.

The petitioner has a great interest in making its land most effective as a shopping center. The malls and walkways are designed and decorated to promote retail business, to please customers and to encourage prospective customers of tenants to come there where they may view and buy merchandise. The petitioner and its tenants spend approximately $350,000.00 each year to maintain the privately owned common areas in the shopping center and to enhance customer motivation. The petitioner's investment is approximately $34,000,000.00.

The petitioner's business is collecting rental income. Tenant merchants do not want handbilling on Lloyd's land. The stipulated testimony was that it is distracting and detrimental to business. The trial court acknowledged that handbilling interferes with customer motivation to buy.

Two shoppers expressed annoyance at the respondents' handbilling during the brief time that they were at the center. Another shopper expressed displeasure with the petitioner for asking the respondents to leave.

The purpose of the respondents' handbilling was to promote what they called "National Draft Card Turn-In Day." They advertised a meeting to be held that night in another part of Portland. The message and purpose of the handbills were not related to any activity carried on in Lloyd Center by the petitioner or any of its tenants.

After a trial without a jury, the District Court rendered an opinion and entered a judgment as follows:

> "1. Plaintiffs have a right to distribute noncommercial handbills in a peaceful and orderly manner in the malls and walkways of Lloyd Center at times when they are open to general public access;
>
> "2. For the reasons set forth in the Court Opinion dated January 15, 1970, defendant Lloyd Corporation, Ltd., and its officers, agents, servants and employees, and those persons in active concert with

them, who receive actual notice of this declaratory judgment and decree by personal service or otherwise, are enjoined from preventing or interfering with the distribution of noncommercial handbills in a peaceful and orderly manner in the malls and walkways within Lloyd Center at times when they are open to general public access . . . ."

The petitioner appealed the judgment to the Court of Appeals for the Ninth Circuit. On May 3, 1971, the day that the case was argued, the Court of Appeals entered an order suspending the submission of the case "pending the allowance or denial of the Petition for Certiorari in the United States Supreme Court in *Diamond* v. *Bland*, 8 Cal. App. 3d 58, 87 Cal. Rptr. 97 (1970), and thereafter, if the petition is allowed, until *Diamond* is decided by the United States Supreme Court." Following receipt of a report that the Supreme Court had denied certiorari in the *Diamond* case, *sub nom. Homart Development Co.* v. *Diamond*, 402 U.S. 988 (1971), the Court of Appeals, on July 7, 1971, rendered a *per curiam* opinion and entered a judgment affirming the decision of the District Court in this case.

REASONS FOR GRANTING THE WRIT

I. This case presents a constitutional question of great importance that has been expressly reserved by this Court.

The question that is squarely presented by the facts of this case is the exact question that this Court noted but expressly stated that it did not answer in *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, *supra*.

In the *Logan Valley* case this Court said:

> "The picketing carried on by Petitioners was directed specifically at patrons of the Weis Market located within the shopping center and the message sought to be conveyed to the public concerned the

> manner in which that particular market was being operated. We are, therefore, not called upon to consider whether Respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put." 391 U.S. at 320 n.9.

The District Court acknowledged that in this case it went further than the *Logan Valley* decision. It said:

> "It is true that the Court in *Logan Valley* left open the question of whether the owner could bar picketing which was not directly related to the use of the Center. . . . If *Logan Valley* does not go as far as I suggest, the First Amendment does." 308 F. Supp. at 131.

The proper resolution of this question left open in *Logan Valley* has great significance. The importance of shopping centers and, thus, the public importance of this question is demonstrated by the statistics cited in *Logan Valley*. *See* 391 U.S. at 324. Until this open question is authoritatively resolved by this Court, interested parties are divided into two camps. Shopping center owners and merchants believe that their interest in effective merchandising justifies preservation of their basic property owner's right to control conduct on their land, except only that under the *Logan Valley* decision they may not prohibit picketing and handbilling that is directly related to shopping center activity. On the other hand, people like the respondents claim an unrestricted right to free use of shopping center land for all noncommercial handbilling. They claim that because of *Logan Valley*, all shopping center property is the same as publicly owned property for all First Amendment purposes.

This disagreement as to how the question left unresolved in *Logan Valley* is to be answered has resulted in a considerable amount of litigation, and lower court judges are divided in their interpretations of that decision.

In *People* v. *Sterling* (Illinois Circuit Court for McLean County, March 19, 1970), *appeal pending*, No. 43499 (Supreme Court of Illinois), the court held that a shopping center owner could bar distribution of political handbills that were not related to the owner's use of the land. The defendant was convicted of trespass.

In *Homart Development Co.* v. *Fein* (Rhode Island Superior Court, August 6, 1970) *appeal pending*, No. 1174-A (Rhode Island Supreme Court), the court held that a shopping center owner could bar campaigning by political candidates and enjoined the defendants. The unreported opinion in that case is printed in the Appendix commencing on page 16a.

In *Ball* v. *California* (Superior Court, Appellate Department, Orange County, California, June 28, 1971), *cert. pending*, No. 71-209, the petitioner was convicted of trespass for soliciting signatures on a petition in the parking lot of Disneyland, which is open to general public access without restrictions.[2]

In *Sutherland* v. *South Center Shopping Center*, 3 Wash. App. 833, 478 P.2d 792 (1971), the Washington Court of Appeals reversed a trial court holding that a shopping center owner could bar solicitation of signatures on an unrelated political petition.

In *State* v. *Miller*, 280 Minn. 566, 159 N.W.2d 895 (1968), the Minnesota Supreme Court held in a *per curiam* opinion that a shopping center owner could not bar political handbilling and reversed a trespass conviction.

In *Diamond* v. *Bland*, 3 Cal. 3d 653, 91 Cal. Rptr. 501, 477 P.2d 733 (1970), the California Supreme Court in a six to one decision, held that the plaintiff was entitled

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[2] The Superior Court refused to certify the case to a higher court, and the Superior Court was accordingly the highest court in which a decision could be had.

to solicit petition signatures on the defendant's shopping center land and ordered that the shopping center owner be enjoined from interfering with the plaintiff. In that case the trial court had refused to enjoin the shopping center owner and that refusal had been unanimously affirmed by the three judges of the California Court of Appeals for the Fourth Appellate District. 8 Cal. App. 3d 58, 87 Cal. Rptr. 97 (1970).

The shopping center owner in the *Diamond* case petitioned this Court for a writ of certiorari. Certiorari was denied, *sub nom. Homart Development Co.* v. *Diamond*, with Chief Justice Burger and Mr. Justice Blackmun stating that they were in favor of granting the petition. 402 U.S. 988 (1971). A petition for rehearing, joined in by both petitioner and respondents in that case, is pending in this Court.[3]

The *Logan Valley* decision has thus created a great deal of uncertainty, confusion and misunderstanding. Enormous amounts of lower court time are being taken to resolve these conflicting interpretations. Arrests for trespass are continuing. Handbillers and shopping center owners alike are exposing themself to tort liability for actions that they take in reliance upon their good faith interpretations of the *Logan Valley* decision. The question should be settled by this Court.

II. This important question was wrongly decided below.

The Court of Appeals did not even consider the question that is presented in this case. It failed to recognize any distinction between handbilling that is related to the

[3] We note that in the *Diamond* case there was a question of mootness because the case involved soliciting for a ballot measure in an election which had already occurred. *Cf. Zwickler* v. *Koota*, 389 U.S. 241 (1967); *Hall* v. *Beals*, 396 U.S. 45 (1969). There is no such question here. The judgment in this case is an absolute prohibition, in perpetuity, against any interference by the petitioner with peaceful and orderly handbilling on its land by the respondents or by others.

owner's use of the land and handbilling that is not so related. That distinction, however, is crucial.

In *Logan Valley*, Mr. Justice Marshall, writing for the Court, emphasized that the purpose of the picketing at issue there was to "criticize" the Weis Market and that if the pickets had to stay on public land, the market would "immunize" itself from "criticism." 391 U.S. at 325. If, as in *Logan Valley*, the subject of a handbill is related to the owner's use of the land, it might be necessary for the handbiller to use the land in order to exercise his right of free speech. If it is not related, the message can be effectively communicated to people anywhere and use of the land is not necessary. *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956).[4]

Thus, the Court in *Logan Valley* relied on three factors as prerequisites to depriving the property owner of its basic right to control the use of its property. They were: (1) that the shopping center was "the functional equivalent of [a public] business district", 391 U.S. at 318, (2) that the handbilling was directly related to the Weis Market and could be effective only at the doors to that market, 391 U.S. at 321-22. and (3) that it was necessary to permit the invasion of private property at a point 350 feet from the public street in order for the picketing to be effective, 391 U.S. at 323. Had this Court intended to permit all handbilling on private shopping center property without requiring these factors, it could have said so in two or three pages.

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[4] In *Marsh* v. *Alabama*, 326 U.S. 501 (1946), the critical factor was that a contrary holding would have insulated residents of the company town from the privilege of freely exchanging ideas that is guaranteed by the First Amendment. If people lived in Lloyd Center, this company town doctrine might apply. But no one lives there. It is simply an accumulation of private stores where people come for brief periods of time to shop. The petitioner could not insulate these people from communication if it wanted to. Lloyd Center is not like a company town where many people who live there do not go anywhere else.

The material factor in our case that the District Court held to be immaterial, and that the Court of Appeals completely overlooked, was the requirement of a direct relation between the handbilling and the use of the private property.

The Court of Appeals said that it was controlled by the District Court's determination that the petitioner's land was "the functional equivalent of a public business district." It called that a "critical determination of fact." But that determination is not at all dispositive of the question in this case. This Court made the same determination in *Logan Valley*, but it still expressly reserved ruling on the question presented here.

The Court of Appeals also said that its decision was "not an extension of the holdings of the Supreme Court in *Amalgamated Food* and *Marsh*." That statement is patently incorrect. In holding that petitioner must permit handbilling that is not directly related to its shopping center use of the property, the Court of Appeals *did* extend this Court's holdings and thus must have misunderstood or completely overlooked the reservation in the *Logan Valley* decision.

The true constitutional question here is not whether the land involved is the functional equivalent of a public business district but it is whether or not exclusion of the handbillers would "immunize" the owner from "criticism" or otherwise "insulate" people from free communi-

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[5] Even less dispositive, although the courts below apparently attached some significance to it, is the fact that the petitioner invited some activities to its malls to attract shoppers and that once a year it permitted the Salvation Army and American Legion poppie sellers to sit or stand at a restricted number of assigned stations. None of these activities involved handbilling and at most they only support the conclusion below that the petitioner's shopping center was "the functional equivalent of a public business district," a determination which itself, as pointed out above, is not dispositive.

cation and whether use of the land is therefore necessary for the effective exercise of First Amendment rights.

This Court has unequivocally stated that people who want to propagandize or protest do not have a constitutional right to do so whenever or wherever or however they please. In *Adderly* v. *Florida*, 385 U.S. 39, 47-48 (1966), the Court said:

> "The state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason, there is no merit to the petitioner's argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this 'area chosen for the peaceful civil rights demonstration was not only "reasonable" but also particularly appropriate . . . .' Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however, and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on, [*Cox* v. *Louisiana*, 379 U.S. 536, 554-55 (1965); *Cox* v. *Louisiana*, 379 U.S. 559, 563-64 (1965)]. We reject it again. The United States Constitution does not forbid a state to control the use of its own property for its own lawful nondiscriminatory purpose."

Traditionally (and under Oregon law), a private property owner's right to exclusive possession and control of his land is protected by state common law and statutory trespass laws. *Martin* v. *City of Struthers*, 319 U.S. 141, 147 (1942); Ore. Rev. Stat. § 164.460. The rights of private property owners, created by state law, are guaranteed by the Fifth Amendment to the Constitution of the United States. *NLRB* v. *Babcock & Wilcox Co.*, *supra*, 351 U.S. at 112.

In the *Martin* case, although this Court struck down an ordinance forbidding all door-to-door distribution of

handbills, it noted approval of narrower provisions, specifically citing the Oregon trespass statute in support of the following statement.

> "Traditionally the American law punishes persons who enter on to the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books for at least twelve states more." 319 U.S. at 147. [Footnotes omitted.]

This Court has thus clearly established the right of a private property owner to control conduct on its land, and certiorari should be granted to review the contrary conclusion of the Court of Appeals.

CONCLUSION

For the reasons stated, the Petition for Certiorari should be granted.

Respectfully submitted,

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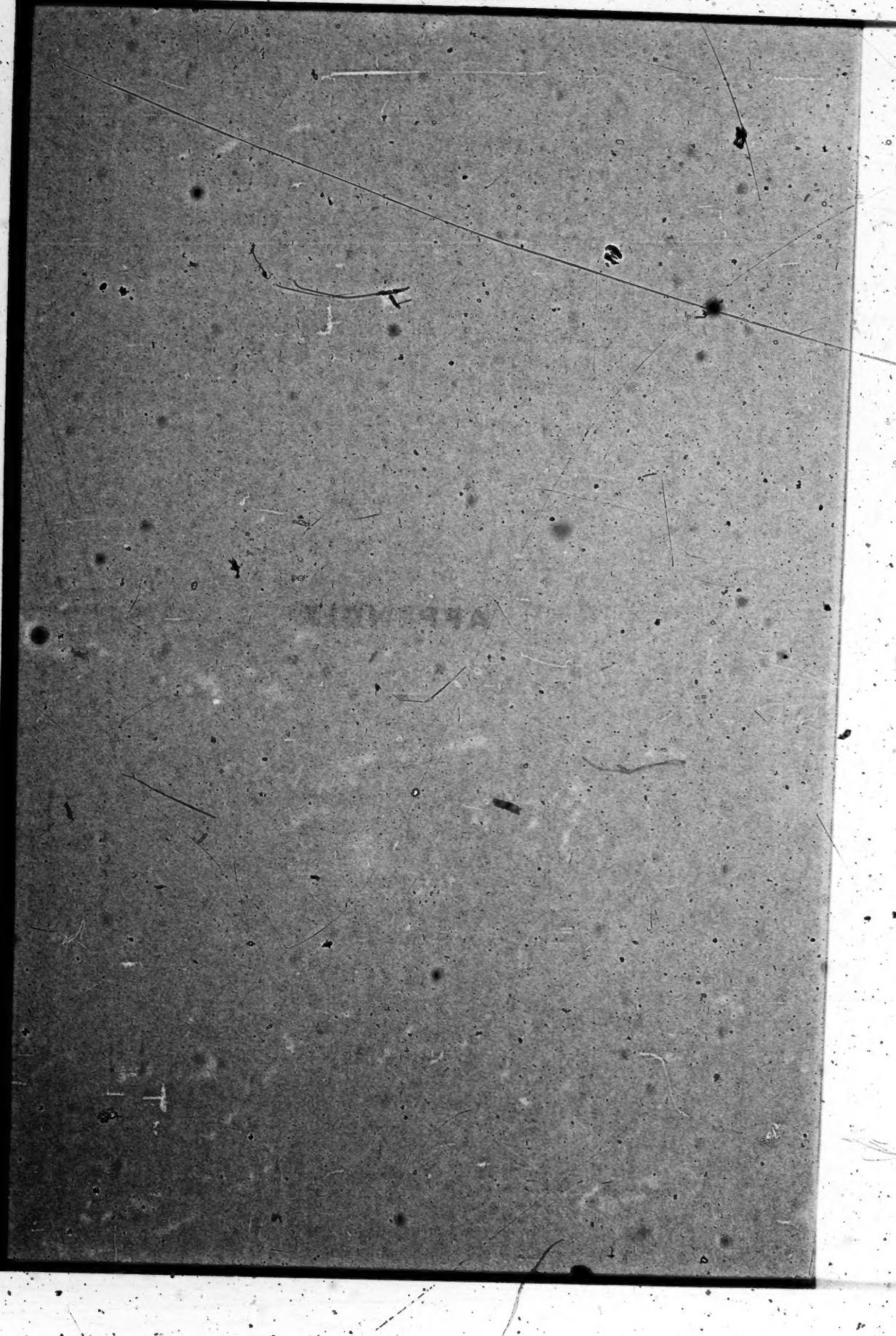

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 25605

DONALD M. TANNER, *et al.*
Appellees,

v.

LLOYD CORPORATION, LTD.,
Appellant.

APPEAL from the United States District Court for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed, with costs in this Court in favor of the appellees and against the appellant.

Filed and entered July 7, 1971.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 25,605

DONALD M. TANNER, BETSY WHEELER, and SUSAN ROBERTS,

Appellees,

v.

LLOYD CORPORATION, LTD.,

Appellant.

[July 7, 1971]

Appeal from the United States District Court for the District of Oregon

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Before: ELY and KILKENNY, Circuit Judges, and LINDBERG, District Judge.*

PER CURIAM:

The appellant and its lessees operate a huge private shopping facility, embracing about fifty acres in the City of Portland, Oregon. The District Court enjoined the appellant from interfering with the appellees' exercise, on the facility premises of certain peaceful activities which the court found were protected under the guarantees of the First Amendment. The court's legal conclusion followed from its factual determination that the appellant's facility was, in scope, "the functional equivalent of a public business district." *Tanner* v. *Lloyd Corp., Ltd.*, 308 F. Supp. 128, 130 (D. Ore. 1970); *cf. Wolin* v. *Port of New York Authority*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968). *See also Amalgamated Food Employees Un-*

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* Hon. William J. Lindberg, United States District Judge, District of Washington, sitting by designation.

ion v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 88 S. Ct. 1601, 20 L. Ed. 2d 603 (1968); *Marsh* v. *Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946). Since such a factual determination, in relation to a particular case, must necessarily rest upon a consideration of all of the demonstrated circumstances of that case, we have concluded that we are powerless to hold that the critical factual determination which is here involved was clearly erroneous. Accordingly, the judgment is affirmed upon the basis of the District Court's Findings of Fact and the reasoning logically followed therefrom, set forth in the court's Opinion reported at 308 F. Supp. 128 (D. Ore. 1970). *See also Diamond* v. *Bland*, 3 Cal. 3d 653, 477 P. 2d 733, 91 Cal. Rptr. 501 (1970), *cert. denied sub nom. Homart Dev. Co.* v. *Diamond*, ___ U.S. ___ (U.S.L.W. May 18, 1971).

Affirmed.[1]

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[1] Our opinion is not, of course, an extension of the holdings of the Supreme Court in *Amalgamated Food* and *Marsh*. The extent to which the appellant's facility had been opened to public use is reflected in the District Court's factual determinations. It was found, *inter alia*, that

> "The Mall is open to the general public. In addition, the Corporation invites groups to conduct activities there, if those activities will promote 'customer motivation.' It has invited schools to hold football rallies, service organizations to hold Veterans Day ceremonies, and presidential candidates to give speeches during election years.
>
> "The Corporation also permits groups which it believes to be worthy to use the Mall even though they do not add to 'customer motivation.' It permits the American Legion to sell 'buddy' poppies at least once each year, and every year before Christmas, it permits bellringers for the Salvation Army and Volunteers of Ameria to set up kettles and solicit contributions.
>
> "The Corporation prohibits other groups from using the Center for their own purposes. It denied the March of Dimes and Hadassah, a national Zionist women's service organization, the opportunity to solicit contributions and denied Governor Tom McCall the opportunity to make a political speech. As part of this policy, the Corporation prohibits the distribution of handbills within the Mall."

308 F. Supp. at 129-30.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 69-127

DONALD M. TANNER, BETSY WHEELER, and SUSAN ROBERTS,

Plaintiffs,

v.

LLOYD CORPORATION, LTD.,

Defendant.

DECLARATORY JUDGMENT AND DECREE

Based upon the Opinion of the Court dated January 15, 1970, which constitutes findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure, it is

ORDERED, that:

1. Plaintiffs have a right to distribute non-commercial handbills in a peaceful and orderly manner in the malls and walkways within Lloyd Center at times when they are open to general public access;

2. For the reasons set forth in the Court Opinion dated January 15, 1970, defendant Lloyd Corporation, Ltd., its officers, agents, servants and employees, and those persons in active concert or participation with them who receive actual notice of this declaratory judgment and decree by personal service or otherwise, are enjoined from preventing or interfering with the distribution of non-commercial handbills in a peaceful and orderly manner in the malls

and walkways within Lloyd Center at times when they are open to general public access; and

3. Plaintiffs have judgment against Lloyd Corporation, Ltd. for their costs and disbursements incurred herein, taxed in the amount of $157.92.

DATED this 27th day of January, 1970.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 69-127

DONALD M. TANNER, BETSY WHEELER, and SUSAN ROBERTS,

Plaintiffs,

v.

LLOYD CORPORATION, LTD.,

Defendant.

OPINION

SOLOMON, Chief Judge:

Donald Tanner, Betsy Wheeler and Susan Roberts brought this action under 42 U.S.C. § 1983[1] and 28 U.S.C. § 2201[2] for a judgment declaring that they have the right to distribute handbills in the Mall of Lloyd Center, a shopping center owned by Lloyd Corporation, Ltd. (Corporation). Plaintiffs also seek to enjoin the Corporation

[1] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[2] "In a case of actual controversy within its jurisdiction, * * * any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

from interfering with that right. Plaintiffs allege jurisdiction under 28 U.S.C. § 1343.[3]

With a few minor exceptions, the parties agree on the facts, but not on the conclusions to be drawn from those facts.

Lloyd Center is a large, modern retail shopping center in Portland, Oregon. The Center covers about 50 acres, including about 20 acres of open and covered parking facilities for more than 1,000 automobiles. It has a perimeter of almost one and one-half miles. The Center is bounded by four public streets—Broadway Street, Lloyd Boulevard, and Ninth and Sixteenth Avenues. It is crossed by Weidler, Halsey, Multnomah, and Holladay Streets running east to west and by Fifteenth Avenue running north to south. At least six other streets run partly into or around the Center.

The streets in and surrounding the Center are publicly owned and have adjacent public sidewalks. The Corporation owns all other land within the Center, and has more than 60 commercial tenants, including small shops and major department stores.

At a few places within the Center, the Corporation has embedded small signs in the sidewalk,[4] which state:

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[3] "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * * (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States * * *."

[4] Plaintiffs' counsel went to the Center and was unable to find these signs. Mr. Horn, the manager of the Center, testified that he ordered the signs installed several years ago and that he assumed they were still there although he did not know exactly where they were.

"NOTICE—Areas In Lloyd Center Used By The Public Are Not Public Ways But Are For The Use of Lloyd Center Tenants And The Public Transacting Business With Them. Permission To Use Said Areas May Be Revoked At Any Time. Lloyd Corporation, Ltd."

The principal portion of the Center is occupied by a unified shopping area, called the "Mall," which covers about 25 acres and has a perimeter of about .8 miles. It is not crossed by public streets. The Mall is a multi-level complex of buildings, parking facilities, sub-malls, sidewalks, stairways, elevators, escalators, bridges, and gardens, and contains a skating rink, statues, murals, benches, directories, information booths, and other facilities designed to attract visitors and make them comfortable.

Pedestrians have access to some of the Mall stores through entrances on both public and Mall sidewalks, while they have access to other stores only from the interior of the Mall. Automobiles enter the Mall from the surrounding public streets.

The Mall is open to the general public. In addition, the Corporation invites groups to conduct activities there, if those activities will promote "customer motivation." It has invited schools to hold football rallies, service organizations to hold Veterans Day ceremonies, and presidential candidates to give speeches during election years.

The Corporation also permits groups which it believes to be worthy to use the Mall even though they do not add to "customer motivation." It permits the American Legion to sell "buddy" poppies at least once each year, and every year before Christmas, it permits bellringers for the Salvation Army and Volunteers of America to set up kettles and solicit contributions.

The Corporation prohibits other groups from using the Center for their own purposes. It denied the March of Dimes and Hadassah, a national Zionist women's service

organization, the opportunity to solicit contributions and denied Governor Tom McCall the opportunity to make a political speech. As part of this policy, the Corporation prohibits the distribution of handbills within the Mall.

The Corporation enforces its rules through twelve commissioned special police officers of the City of Portland, whom it employs as Security Guards. The Guards have full police authority, carry guns, and wear uniforms similar to those worn by the Portland Police.

On November 14, 1968, Plaintiffs entered the Mall and distributed handbill invitations to a meeting of the "Resistance Community" to protest the draft and the Vietnam War. The distribution was quiet, orderly, and did not interfere with the Mall selling activities, and there was no littering. Nevertheless, the Security Guards told Plaintiffs that they would be arrested unless they stopped distributing the handbills within the Mall. The Guards suggested that Plaintiffs distribute their literature on the public streets and sidewalks. Plaintiffs left the Mall to avoid arrest [5] and subsequently brought this action.

The Corporation raises a number of preliminary issues of fact and law.

1. The Corporation asserts that the Mall is not open to the general public; that it is similar to an office building; and that the signs in the sidewalk inform visitors

[5] Plaintiffs testified that they were told that they *would* be arrested, and that they left to avoid arrest. The Corporation asserts that the Guards said that they *could* call regular city police officers to arrest Plaintiffs. The Agreed Facts in the Pretrial Order state that the Guards told Plaintiffs they *could* be arrested. According to the testimony of the Corporation, the Guards have arrested persons on the Mall for other offenses, but have never arrested anyone for distributing handbills and did not intend to arrest Plaintiffs here. The Corporation refuses to promise that it will not arrest Plaintiffs if they return to distribute handbills.

In my view, the Guards caused Plaintiffs to believe that the Guards, in their official capacity as policemen, would arrest Plaintiffs or would cause their arrest.

that they are permitted to enter the Mall only for the purpose of transacting business.

In 1954, when the Corporation acquired land for the Center, the City of Portland vacated about eight acres of public streets for use by the Corporation. The ordinance by which the City vacated the streets recited that the City intended that the Corporation should use the land for the construction of "a general retail business district." In spite of this ordinance, the Corporation now asserts that the Mall is like an office building rather than like a public business district. Although the Mall's multi-level design is not yet common among modern shopping centers, the Mall is a prototype for future city planning. Its parking facilities and sidewalks serve the same purpose as streets and sidewalks of a public business district. I find that the Mall is the functional equivalent of a public business district. *Cf. Wolin* v. *Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968).

The Corporation invites everyone to the Center and permits anyone to enter the Mall. It hopes that visitors who go there without the intention of buying will change their minds while visiting at the Center or while windowshopping or browsing. The few "private property" signs embedded in the sidewalk are small. Few people are likely to notice them. The Center's manager did not even know where they were. Although the parking facilities are closed during the late night and early morning hours, the walkways in the Mall are open to pedestrian traffic 24 hours a day. I find that the Mall is open to the general public.

2. The Corporation asserts that the distribution of handbills interferes with Mall selling activities. It is true that under some circumstances, conduct accompanying the distribution of handbills could interfere with Mall business. Here, however, Plaintiffs' sole activity was the distribution of handbills to those who were willing to take them. There was no litering or disturbance. I find that

Plaintiffs were engaged in the pure expression of political beliefs. *Cf. Wolin* v. *Port of New York Authority, supra.* Plaintiffs' activities affected Mall business only to the extent that the expression of beliefs interferes with customers' motivation to buy.

3. The Corporation contends that Plaintiffs can distribute handbills just as effectively from the public streets and sidewalks as from the interior of the Mall. It would be difficult and perhaps dangerous for Plaintiffs to distribute their handbills from the public sidewalks to customers entering the Mall. Many customers do not use the public sidewalks and streets except when entering the Mall by automobile. In addition, it would be much more difficult to reach pedestrians on the public sidewalks than to reach them in parts of the Mall interior through which most customers pass. I find that Plaintiffs cannot distribute handbills as effectively from the public streets and sidewalks as they can from the Mall interior.

4. The Corporation's contention that its Guards were merely exercising their First Amendment rights when they told Plaintiffs to leave or be arrested is frivolous.

5. The Corporation contends that it relied solely on the Oregon trespass statute when it ordered Plaintiffs to leave. It argues that this Court should abstain from deciding this case until the Oregon courts have decided whether the statute applies to Plaintiffs.[6] In the alternative, the Corporation argues that a three-judge court must hear this case because it is an action to declare the Oregon trespass statute unconstitutional. The Corporation does not, however, concede that Plaintiffs have the right to distribute handbills within the Mall if the Oregon statute is inapplicable. It claims the private property right under the Fifth Amendment to exclude Plaintiffs regardless of the statute. The issue here, therefore, is not

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[6] The Corporation admits that no action which would yield such a decision is pending in the Oregon courts.

whether the Oregon statute is constitutional. It is whether the Fifth Amendment gives the Corporation the right to prohibit Plaintiffs' activities.

6. The Corporation asserts that Plaintiffs failed to state a cause of action under 42 U.S.C. § 1983 because the Corporation did not act under color of state law. The Corporation's Security Guards had full police authority from the City of Portland and exercised that authority to cause Plaintiffs to leave the Mall. This constituted action under color of state law. See *Williams* v. *United States*, 341 U.S. 97 (1951); *De Carlo* v. *Joseph Horne & Co.*, 251 F.Supp. 935 (W.D.Pa. 1966).

On the merits of this case, I find that the Corporation's rule prohibiting the distribution of handbills within the Mall violates Plaintiffs' First Amendment rights. I do not believe the Corporation may decide what groups may distribute literature within the Mall. Neither do I believe the Corporation may prohibit all distribution of handbills.

In *Marsh* v. *Alabama*, 326 U.S. 501 (1946), Marsh, a Jehovah's Witness, was convicted of trespass because she distributed religious literature in the shopping area of a company town after the owner warned her to leave. The town, Chickasaw, Alabama, had all the characteristics of a normal American town. Its streets and sidewalks, though privately owned, connected to publicly owned streets and were open to the general public.

Alabama argued that the owner had absolute dominion over the use of his property and that the owner had the right to bar the distribution of all literature within the town or to decide which literature could be distributed. The Court rejected this argument:

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory

and constitutional rights of those who use it." 326 U.S. at 506.

For citizens to participate in this nation's government, the Court said, it is necessary that the public be informed and that its information be uncensored. Balancing Marsh's First Amendment rights against the owner's property rights, the Court held that Marsh's rights occupied a "preferred position" and weighed heavier than the owner's rights. The Court therefore reversed Marsh's conviction.

Plaintiffs' distribution of handbills here was identical to the distribution of literature in *Marsh*. Here also, the owner claims the right to bar the distribution of literature or to select which literature may be distributed. The sole distinction between this case and *Marsh* is that this case involves a shopping center whereas *Marsh* involved a town. I do not believe that distinction should cause a different result.

In *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), the Supreme Court expressly extended *Marsh* to shopping centers. The Logan Valley Mall was bordered on two sides by public streets and had a perimeter of 1.1 miles and space for at least 17 commercial tenants. It was open to the general public and had sidewalks, parking lots, and roadways for automobiles. The owner sought to enjoin a union from picketing a store within the shopping center.

The owner argued that *Marsh* involved an entire town and therefore was not applicable to a shopping center. The Supreme Court did not agree:

> "We see no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the

"business district' is not under the same ownership." 391 U.S. at 319.

It is true that the Court in *Logan Valley* left open the question whether the owner could bar picketing which was not directly related to the use of the center. Here, Plaintiffs' distribution of handbills was pure speech. I believe that there is no reason, as the Court said in *Logan Valley*, to distinguish a company town from a shopping center which functions as a business district.

If *Logan Valley* does not go as far as I suggest, the First Amendment does. In my view, an owner who opens his land to the general public for business purposes, to the extent that the land becomes the functional equivalent of a public business district, gives up the right to prohibit the distribution of literature or to decide which literature may be distributed. If this were not true, the public need for uncensored information, on which *Marsh* was based, could be frustrated.

After Plaintiffs brought this action, the Corporation, in an attempt to avoid an adjudication on the merits, asserted that Plaintiffs' distribution of handbills on November 14 violated the Selective Service laws. I do not believe this contention is relevant to this controversy. The evidence shows that the Guards were enforcing their employer's policy prohibiting individuals from distributing handbills unless they received prior approval by the Corporation. There is no evidence that the Guards thought Plaintiffs' activities were illegal. If they did, it would be unlikely that they would have suggested that Plaintiffs continue their activities on the public sidewalks. If the Corporation wishes to prevent speech which it believes is illegal, it should do so through arrest and prosecution in the normal course, not through the prohibition of all speech. *Wolin* v. *Port of New York Authority, supra*, 392 F.2d at 91 n. 11.

Plaintiffs are entitled to a judgment declaring that they have the right to distribute handbills within the Lloyd Center Mall. They are also entitled to an injunction restraining Lloyd Corporation from interfering with that right.

This opinion shall constitute findings of fact and conclusions of law in accordance with Rule 52(a) Fed.R. Civ.P.

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

Kent, Sc. Superior Court

'70-275

HOMART DEVELOPMENT COMPANY,

v.

DANIEL FEIN, JOSEPH TRAUGOTT, JOHN POWERS.

August 6, 1970.

(P. M. Session.)

LAGUEUX, *J.*: This matter is before the court on a prayer for a temporary injunction by Homart Development Company against Daniel Fein, Joseph Traugott, John Powers and the Rhode Island Socialist Workers Party. The claim is that the defendants individually as candidates for national and state office under the banner of Rhode Island Socialist Workers Party have entered onto premises owned by the plaintiff and leased by it to tenants, for the purpose of soliciting signatures on primary nomination papers and exhorting customers of these tenants to support their views and that they have been denied permission to use these premises for that purpose and that they have indicated that they will continue to use the premises for that purpose unless enjoined temporarily and permanently in accordance with the prayer. So the case is before the court now on a request for a temporary injunction.

The basic test which is applied in determining whether a temporary injunction shall issue is whether or not there

is a reasonable probability that the plaintiff will prevail at the hearing on the merits. This case does not present many factual disputes. It essentially presents a basic question of law. However, I think it's necessary for the court to make some preliminary findings of fact. The premises owned by the plaintiff consist of some forty-five acres of land in the city of Warwick containing some seventy-three stores which are leased out. The unusual feature of this shopping center is that it is essentially under one roof in two levels with a minor exception; namely, there is a Sears Auto store in another location on the premises and another minor building. The parking area is very large. This shopping area is open to the public between 9:30 in the morning and 9:30 in the evening, six days a week, and on Sundays some of the businesses in the area are open although not all. Probably the majority of them are not open on Sunday. The testimony is that on an average day 18,000 people attend the area for various purposes. The plaintiff, Homart Development Company, which operates eight of these centers throughout the country, has a national policy and I find that they have a local policy, non-discriminatory in effect, that no political candidates will be allowed to use their premises for solicitation purposes. That means that no candidates will be allowed to use their premises for solicitation of signatures, votes or other campaign purposes. Plaintiff also has a general policy not to allow outside groups, and by outside groups I mean groups other than their own tenants, to use the premises unless the use will be for a display or some sort of an activity which will be of some attraction to the general public, attracting people to the area. Examples of that policy in effect have been for example, to allow use of the premises for art exhibits by gifted children. Presumably this will attract people who are interested in looking at these things and maybe also, in the process, bring them into some of the stores. Camping exhibits and ecology exhibits were conducted and even in one instance, it allowed a radio sta-

tion to conduct a program whereby people could drop by and leave off a gift for soldiers in Viet Nam.

The defendants, Daniel Fein, Joseph Traugott, and John Powers, are candidates for the offices of United States senator, governor, lieutenant governor in the State of Rhode Island (not necessarily in that order) under the aegis of the United States Socialist Party. Their purpose for using the premises in question is to secure signatures on their nomination papers so that they may secure the necessary five hundred to place them on the ballot in November and also to expound on their political views in an effort to solicit support in the coming election in the event they are on the ballot. Also the testimony indicates, if they are on the ballot, they intend to use the premises at some later time for campaigning purposes; namely, to meet people, pass out leaflets and to expound their views. Their reason for wanting to use this particular area is that it's the most convenient place to meet a lot of people, a lot of Rhode Islanders, to secure signatures and to secure support. The defendants used the premises on three occasions in late July 1970. Some or all used it on all three occasions. On one occasion they used it for approximately one hour and were asked to leave. The area they used on that occasion was marked on an exhibit, Plaintiff's Exhibit "1" in ink. There was testimony that they returned on another occasion and used the other side of the building, were asked to leave and left and that they returned on a third occasion and at that time were served with a temporary restraining order.

The defendants assert, in substance, that they can use these premises for these purposes because of the guarantee of the right of free speech and to assemble in the First Amendment of the United States Constitution. I think it may be well to point out that the right of free speech and all first amendment rights are not absolute and that they may be subject to some regulation at times. There are many examples of this. These rights may also

come in conflict with other rights equally well guaranteed by the United States Constitution. For example, in the courtroom on the criminal calendar we continually have the problem of balancing the first amendment right of free press against the right of the particular defendant before the court to a fair trial. In the area of free speech, there have been limitations imposed by the United States Supreme Court enunciating a clear and present danger doctrine. Limitations are imposed by libel laws enacted by legislatures and by the common law. A person may be free to speak but if he speaks in a certain way he may be criminally or civilly liable, so that the right of free speech is not absolute and this is particularly so when the right conflicts with another constitutional right. We have here involved another constitutional right and that is the right to use one's own property as one sees fit subject to reasonable regulations made in accordance with due process of law. The due process clause of the United States Constitution is applicable both to the states and to the federal government. It guarantees not only life and liberty but property. I should note here that this is not a discrimination case. There is no evidence before the court that these particular defendants have been discriminated against by application of any policy enunciated by the plaintiffs. In other words, there is no evidence that other political parties, other candidates, have been allowed to use these premises to solicit signatures or for campaign purposes.

The crux of the situation is that the Midland Mall in Warwick is private property. Some people may say it's quasi public property. The use of the word "quasi" to me is meaningless. It's a means of covering up or sloganizing the basic concepts and ideas, which must be investigated in order to make a proper determination of the merits of a controversy such as this.

This property is private. However, the public is invited, but the public is not invited for all purposes but

rather for a limited purpose—namely, to shop and to perform functions incidental to the operation of the center. In other words, the public is invited to come upon the Midland Mall for reasons directly connected with the profit-making motives of the owners of the mall. The presence of the defendants there is not pursuant to that invitation. Defendants are there for their own private purposes and not for any purpose directly related to the reason that this shopping center exists.

Cases have been cited to me by counsel for the defendants and discussed by both counsel, to attempt to sustain the proposition that the defendants have a right to be there, to speak there, to solicit support there from customers. It would be well to simply discuss these cases very briefly. The landmark case is *Marsh* v. *Alabama* where the United States Supreme Court held that in a company-owned town where there were no other reasonable alternatives available, a Jehovah witness could not be prevented from disseminating literature in accordance with that person's religious belief. That case is not applicable to the situation here. We are not dealing with a company-owned town. We're not dealing with a situation where there are no reasonable alternatives. The other landmark case is the *Logan Valley Plaza* case also decided by the United States Supreme Court, which stands for the proposition that in labor disputes union people interested in that labor dispute can picket a lessee in one of these shopping areas. I have no dispute with that case. I think it's well decided but again it is not applicable to this situation. The two other federal cases cited to me by Mr. Stanzler, I find inapplicable. The case of *Tanner* v. *Lloyd* which is a district court case in Oregon was also cited to the court. I don't find the court's decision convincing. I am impressed by the reasoning in the case of *Diamond* v. *Bland* decided by the Court of Appeals for the 4th District, 2nd Division, State of California which was filed on May 25, 1970. A copy of that decision was made available to me by Mr. Wells and a copy of that

decision will be filed with the records of this case in the event that it is not reported elsewhere. It would serve no useful purpose for me to go over all the points made in that decision by the three judges who decided it. I would probably come out second best in trying to articulate their views which I agree with. They have done the subject justice.

An important point to keep in mind is that there were reasonable alternatives available to these defendants to pursue their political hopes and aspirations. There are other places where they can solicit signatures. They can campaign in other shopping centers when given permission by the owners which has been given to these defendants in the past. The owners of real property and shopping centers can decide for themselves. There are public parks available. There are sidewalks, public areas of all sorts and house to house canvassing available. This court is not a stranger to political campaigning. When Mr. Fein was on the stand I was reminded that six years ago I was a candidate for the office which he is now seeking and I recall campaigning all over the state but always by permission of those who owned private property.

The consequences of allowing this conduct in this particular case I think would be staggering. If, at this time, the court allowed these three individual defendants and this particular political party to use the premises at the Midland Mall for soliciting signatures and for campaigning purposes then certainly all other candidates for office would be privileged to do likewise even at the same time. It could be chaotic in that area. The court here must indulge in a balancing process. It must balance one constitutional right against another. It must balance the constitutional right to freely speak and to assemble for redress of political grievances against the policy of the plaintiff which is non-discriminatory in nature and effect, which it chooses to promulgate for the protection of its legitimate business interest and protectable property

rights. The defendants first amendment rights can be exercised elsewhere as effectively as it could be exercised on plaintiff's premises. It may not be as convenient but the final result can be as effective. Therefore, the court is striking a balance and both rights are allowed to co-exist. The temporary injunction prayed for may issue enjoining the defendants from soliciting signatures for their nomination papers on the premises of the plaintiff and also from campaigning for political office on those premises. Present an order.

(Adjourned.)

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In the Supreme Court
of the United States

OCTOBER TERM, 1971

No. 71-492

LLOYD CORPORATION, LTD.,
Petitioner,

v.

DONALD M. TANNER, et al,
Respondents.

BRIEF IN OPPOSITION
TO
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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of the United States

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

QUESTION PRESENTED

Whether the constitutional right of free expression includes the right to distribute non-commercial handbills in a peaceful and orderly manner within the malls and walkways of petitioner's shopping center which are functional equivalents of sidewalks of a public business district at times when they are open to general public access, particularly when petitioner permits non-commercial expression there by other outside groups whose ideas and purposes are approved by petitioner?

STATEMENT OF THE CASE

Respondents being dissatisfied with petitioner's Statement of the Case, this additional statement is submitted to facilitate understanding of the question presented.

This case involves a large urban shopping center known as Lloyd Center opened by petitioner in 1960 (Tr. p. 14). It is situated on all or parts of 39 city blocks, plus vacated former streets and sidewalk areas, near the center of the city of Portland (Ex. 3, 3A). The central portion of the shopping center complex is a single structure of several levels situated on what was formerly 18 city blocks (Ex. 3, 4, 5). This portion of the shopping center was referred to by the District Court as the "Mall" (Pet. App. 8a). The Mall, as well as other portions of petitioner's shopping center complex, was made possible by the city of Portland vacating public streets and sidewalks formerly traversing what is now the privately-owned shopping center property (Ex. 24, 27; Pet. App. 10a). The former public street and sidewalk area so vacated was 8.838 acres (Ex. 25, 26).

Within petitioner's shopping center are numerous broad malls and walkways leading from the central mall to covered and open parking areas and to exterior public sidewalks and streets. A skating rink and an auditorium used for public meetings are situated within the Mall. The malls and walkways within the shopping center are open to the general public at all times (Pet. App. 10a).

Petitioner maintained and enforced a policy forbidding distribution of any handbills or other literature of any sort on the malls, walkways and other areas open to the general public within the shopping center (Pet. App. 9a). This policy is enforced by petitioner's staff of uniformed security guards, who hold commissions from the city of Portland appointing them Special Police Officers "vested with full police authority" (R. 17; Ex. 7). Petitioner, however, has permitted a variety of non-commercial activities on the malls and walkways open to the general public within the shopping center (Pet. App. 8a). The Salvation Army and Volunteers of America are permitted to solicit funds through bell-ringers in the Christmas Season. A veterans organization is allowed to sell "Buddy Poppies." Displays have been set up in the malls by outside organizations such as the Boy Scouts and antique automobile groups. Election rallies for presidential candidates, football rallies, Veterans Day ceremonies by veterans' organizations, and performances by outside musical groups have all been permitted in these areas by petitioner.

Petitioner, however, has not permitted all outside organizations to engage in similar non-commercial activities on malls within the shopping center. It has refused permission, for example, for solicitations by the March of Dimes and Hadassah, a national Zionist women's service organization. Permission for non-commercial activities on the malls within the shopping center is granted by petitioner to outside groups

on the basis of whether it approves of a particular organization and its purposes (Pet. App. 8a-9a).

On November 14, 1968, a number of persons, including respondents, distributed leaflets to passersby at various points within the walkways of the Mall. The distributors were associated with an informal group known as "The Resistance" or "The Resistance Community," whose common interest is opposition to the war in Vietnam.

The leaflets contained both an invitation and a political message. They invited the public to a potluck dinner and meeting to be held that evening at a church, characterizing it as a "Celebration of life," and a "communial feast and liturgy of liberation." The political statements on the leaflets included (Ex. 1):

> "The brothers and sisters of the community will be affirming their commitment to Life by severing their connection with the Selective Service System and the international murder that it supports.
>
> . . . . .
>
> "The Resistance is people enough concerned about the guns and bombs of war (Vietnam, Guatemala, Laos) to deal with the problem actively. The Resistance is the young man who refuses to cooperate with the Selective Service, a tool of killing in a fashion only a little more politely than a gunman gone wild in the streets. The Resistance is people who refuse their taxes (82% for war in '68). The Resistance is you and me, aiding and abetting these people, all people to live in brotherhood and peace."

Respondents and others distributing the leaflets on the walkways of the shopping center, were ordered by petitioner's security guards to cease distribution within the shopping center. The security guards threatened respondents with arrest if they did not comply with these orders (Pet. App. 9a). To avoid arrest, respondents and other persons distributing the leaflets within the shopping center moved to the exterior public sidewalks outside the shopping center to complete their distribution.

The distribution of the leaflets within the shopping center was at all times peaceful and orderly, and did not interfere with normal use of the malls and walkways by the public (Pet. App. 9a).

The District Court found that the interior parking facilities and walkways of the shopping center serve the same purpose as streets and sidewalks of a public business district, and that the Mall is the functional equivalent of a public business district (Pet. App. 10 a). It held that respondents had a constitutional right to distribute the handbills in question in an orderly and peaceful manner to passersby in the walkways of the shopping center. The Court further held that threats of arrest in the exercise of their police authority by petitioner's uniformed security guards caused the distributors to discontinue their handbilling, and constituted action "under color of law," in violation of 42 U.S.C. § 1983. The decision and Declaratory Judgment and Decree of the District Court were affirmed by the Court of Appeals.

ARGUMENT

Reasons for Denying the Writ

I

The constitutional question has been decided against Petitioner's position by every Appellate Court considering it.

Petitioner contends incorrectly that this case involves a question left open in *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968): whether picketing on privately owned shopping center property is within First Amendment guaranties if it is not "directly related in its purpose" to the use of the property by the owner and its tenants.

This case does not involve picketing and its greater potential for economic disruption and interference with normal business activities. It involves only pure expression of a political viewpoint in the form of handbilling. Every appellate court considering the point has rejected petitioner's argument here that the constitutional right of free political expression does not exist on walkways open to the general public within privately owned shopping centers, unless directed to the owner or an occupant of the shopping center. *Diamond* v. *Bland*, 3 Cal. 3d 653, 477 P.2d 733 (1970), cert. den. 402 U.S. 988 (1971), reh. den. — U.S. — (10/12/71); *Sutherland* v. *South Center Shopping Center*, 3 Wash. App. 833, 478 P.2d 792 (1971); *State* v. *Miller*, 280 Minn. 566, 159 N.W.2d

895 (1968); *Tanner* v. *Lloyd Corp.*, — F.2d — (C.A. 9, 1971). The only holdings to the contrary are by three trial courts, whose decisions are all pending for review in appellate courts (see Petition for Cert., p. 9).

The uniform decisions by appellate courts on the issue raised by petitioner here refute petitioner's claim that *Logan Valley* presently causes any confusion or uncertainty on the correct disposition of the issue.

II

The constitutional question was correctly decided below.

Petitioner does not challenge the findings below that its shopping center is "the functional equivalent of a public business district" and that the interior parking areas and walkways of the shopping center are functional equivalents of streets and sidewalks of a public business district (Pet. App. 10a). Indeed, it could hardly do so when the shopping center complex was created by vacation of public streets and sidewalks which formerly traversed the site of the shopping center. Instead, petitioner argues that constitutional guaranties of free expression do not extend to areas of the shopping center which are functional equivalents of public sidewalks unless the expression is related directly to some use being made by the owner or occupants of the shopping center property and the expression is "necessary" for effective communication.

If respondents had leafleted on a city sidewalk in the same peaceful and orderly fashion as shown by the evidence in this case, it could not be prohibited. *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415 (1971); *Lovell* v. *Griffin*, 308 U.S. 444 (1938). No relationship of the expression to normal uses of the sidewalk or adjacent property is required as a condition to free exercise of expression there, nor is it material that the expression might be communicated effectively elsewhere. *Schneider* v. *State*, 308 U.S. 147 (1939); *Jones* v. *Board of Regents*, 436 F.2d 618, 622 (C.A. 9, 1970).

Marsh v. *Alabama*, 326 U.S. 501 (1946), held that the constitutional rights of free expression may be exercised on privately owned sidewalks of a company town which were the functional equivalent of a public business district. *Marsh* was applied to privately owned shopping centers in *Logan Valley:*

> "We see no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the 'business district' is not under the same ownership.
>
> . . . . . .
>
> "And it may well be that respondents' ownership of the property here in question gives them various rights, under the laws of Pennsylvania, to limit the use of that property by members of the public in a manner that would not be permis-

sible were the property owned by a municipality. All we decide here is that because the shopping center serves as the community business block 'and is freely accessible and open to the people in the area and those passing through,' *Marsh* v. *Alabama*, 326 US at 508, 90 L Ed at 269, the State may not delegate the power through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put." (391 U.S. at 319-320).

The rationale of both *Marsh* and *Logan Valley*, as well as of the courts below in this case, is that to permit private owners of the functional equivalents of public sidewalks in the functional equivalent of a public business district to prohibit or limit communications to the public frustrates the public's need for uncensored information. This Court in *Logan Valley* recognized that such limitations in the context of large modern shopping centers would stifle free expression in some business districts of the city, and thus confine free speech and press to publically-owned business districts. 391 U.S. at 324-325. Without the "functional equivalent" doctrine of *Marsh* and *Logan Valley*, freedom of communication would be restricted in direct proportion to the continued growth of private shopping centers noted by the court in *Logan Valley*, 391 U.S. at 324.

Petitioner's contention that the Court of Appeals was "patently incorrect" in stating that its holding

here was not an extension of *Logan Valley* or *Marsh*, misapprehends the opinion. The Court of Appeals, quoting the District Court, noted that petitioner had opened its shopping center to widespread use by outside groups whose expression was not directed toward petitioner or its tenants occupying the property (Pet. App. 3a, 8a-9a):

> "The Mall is open to the general public. In addition, the Corporation invites groups to conduct activities there, if those activities will promote 'customer motivation.' It has invited schools to hold football rallies, service organizations to hold Veterans Day ceremonies, and presidential candidates to give speeches during election years.
>
> "The Corporation also permits groups which it believes to be worthy to use the Mall even though they do not add to 'customer motivation.' It permits the American Legion to sell 'buddy' poppies at least once each year, and every year before Christmas, it permits bellringers for the Salvation Army and Volunteers of America to set up kettles and solicit contributions.
>
> "The Corporation prohibits other groups from using the Center for their own purposes. It denied the March of Dimes and Hadassah, a national Zionist women's service organization, the opportunity to solicit contributions and denied Governor Tom McCall the opportunity to make a political speech. As part of this policy, the Corporation prohibits the distribution of handbills within the Mall."

Thus, respondents' peaceful and orderly handbilling here was exercise of "their First Amendment rights

on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put" (*Logan Valley*, 391 U.S. at 319-320).

Petitioner argues that respondents' distribution of leaflets within the shopping center was not "necessary" to effective expression of their views. As pointed out above, this is immaterial. In any event, the finding of the District Court is contrary to petitioner's contention:

> "The Corporation contends that Plaintiffs can distribute handbills just as effectively from the public streets and sidewalks as from the interior of the Mall. It would be difficult and perhaps dangerous for Plaintiffs to distribute their handbills from the public sidewalks to customers entering the Mall. Many customers do not use the public sidewalks and streets except when entering the Mall by automobile. In addition, it would be much more difficult to reach pedestrians on the public sidewalks than to reach them in parts of the Mall interior through which most customers pass. I find that plaintiffs cannot distribute handbills as effectively from the public streets and sidewalks as they can from the Mall interior." (Pet. App. 11a).

Note that the leafletters in *Austin*, *supra*, 402 U.S. 415, went to a shopping center to accomplish effective dissemination of their views to the public.

Petitioner argues that it has an absolute right to prohibit expression anywhere on its shopping center property, to whatever extent it may see fit (Petition, 13-14). This absolute position has been consistently

rejected by the courts since *Marsh:*

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." 326 U.S. at 506.

Expression on private property which is the functional equivalent of a public business district is no doubt subject to limited regulation, as it is on public property, to prevent unreasonable interference with or disruption of the normal uses of the property. E.g., *Adderly* v. *Florida*, 385 U.S. 39 (1966). This case, however, does not involve any question of reasonable regulation or limitation of expression, but an attempt by petitioner to enforce a complete and absolute prohibition on any and all handbilling anywhere within its shopping center property. The courts below, following *Marsh* and *Logan Valley*, correctly rejected petitioner's position.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-492

LLOYD CORPORATION, LTD.,
Petitioner,

v.

DONALD M. TANNER, ET AL.,
Respondents.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Events subsequent to the filing of the petition have intensified the need for this Court's authoritative resolution of the important question presented: Whether a shopping center owner must permit noncommercial handbilling that is not directly related to his use of the land.

This Court has since declined to review two California cases involving the general issue which reached different results: *Diamond* v. *Bland*, enjoining a shopping center from interfering with the solicitation of petition signatures on its land;[1] and *Ball* v. *California*, where the petitioner was convicted of trespass for soliciting petition signatures in the parking lot of Disneyland without the

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[1] Petition for rehearing of denial of certiorari denied October 12, 1971, *sub nom. Homart Development Co.* v. *Diamond*, No. 1469 O.T. 1970, —— U.S. ——.

owner's permission.[2] Although we appreciate that these cases may be distinguishable and otherwise regarded as inappropriate for review, we respectfully submit that the result has been to add further uncertainty to an already confused subject. Resolution of this uncertainty is especially important before political campaigning begins in the coming election year. Supporters of various candidates and propositions will want to use shopping center property for handbilling activities. Shopping center owners throughout the United States who regard handbilling as distracting to their business will rely upon the language of this Court's *Logan Valley* decision, 391 U.S. 308 (1968), as authority for their right to exclude political handbillers. Those handbillers, in turn, will rely upon lower court decisions in this and other cases as authority for their right to use shopping center lands to handbill for their candidates and causes. Confusion and controversy will be inevitable unless this Court promptly clarifies the law by deciding the handbilling question left open in *Logan Valley* which is presented by this case.

None of the arguments in the respondents' brief in opposition have minimized the importance of the question presented in this case or contradicted the fact that it was left open by this Court in *Logan Valley*. Respondents do make a specious effort to distinguish *Logan Valley* by asserting that this case does not involve picketing and that handbilling, unlike picketing, "involves only pure expression" (Brief p. 6). This effort is squarely contradicted by *Logan Valley* which not only involved handbilling as well as picketing (391 U.S. at 312), but also expressly recognized that "[h]andbilling, like picketing, involves conduct other than speech . . ." (*id.* at 315-16), and did not differentiate in its treatment of handbilling and picketing (*id.* at 322 and n.11).

---

[2] Petition for certiorari denied October 26, 1971, No. 71-209, —— U.S. ——.

Equally without merit is the apparent attempt of respondents to suggest—by dwelling in their brief on the extent to which petitioner permitted certain noncommercial activities on its premises—that petitioner discriminated against respondents in favor of other groups whose purposes it approved. As found by the District Court and noted in the petition (p. 12, n.5), petitioner did invite some activities to attract shoppers, such as Boy Scout displays and speeches by presidential candidates Eugene McCarthy, Robert Kennedy and Richard Nixon, and also permitted some charitable solicitations. However, none of those activities involved handbilling, which petitioner regards as bad for business and which, as the District Court also found, petitioner "prohibits . . . within the Mall" (Pet. App. p. 9a). Since petitioner indiscriminately excluded all handbilling, there is no basis for respondents' apparent suggestion that petitioner discriminated against them in favor of others. Likewise, the order under review makes no reference to discrimination. It is an absolute prohibition against any interference with any noncommercial handbilling, and is thus obviously not grounded on discrimination.

To the extent that the activities that the petitioner permitted, in the belief that they were good for business, had any relevance, they were at the most considered by the courts below as evidence that the petitioner's shopping center is the "functional equivalent of a public business district."[3] It having been found that, like the land in *Logan Valley*, this shopping center is that "functional equivalent," the question then remains which was left open in *Logan Valley*—is the petitioner constitutionally required to allow noncommercial handbilling that is not directly related to its use of the land?

---

[3] In reality these particular activities are more persuasive in tending to show that the petitioner's land is private than they are as evidence that it has a public character.

For the reasons stated in the petition and this reply brief, certiorari should be granted to decide this question.

Respectfully submitted,

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 446 F.2d 545. The opinion of the District Court is reported at 308 F. Supp. 128. These opinions, as well as the judgments of both courts, are reprinted in the Appendix to the Petition for Certiorari and appear at pages 2a and 6a, respectively.

JURISDICTION

This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered July 7, 1971. The Petition for a Writ of Certiorari was filed on October 5, 1971, and was granted by this Court on January 17, 1972.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case, Amendments I, V and XIV of the United States Constitution, 28 U.S.C. § 1343, 42 U.S.C. § 1983, and the Oregon and City of Portland trespass laws, are reprinted in the appendix to this brief.

QUESTION PRESENTED

Does the First Amendment require Petitioner, as the owner of a shopping center, to open its land to all non-commercial handbilling even though the purpose of the handbilling is not related to Petitioner's use of the land or to any activity being conducted thereon, and use of Petitioner's land is not necessary to accomplish the purpose of the handbilling?

STATEMENT OF THE CASE

This case raises questions reserved by this Court in *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), concerning the right of a privately-owned shopping center to bar handbilling on its property, when the handbilling is unrelated to the shopping center's operations and publicly-owned areas are available for such distribution.

Facts:

As the District Court noted, the parties generally agreed on the facts. Pet. App. 7a.[1]

Petitioner, Lloyd Corporation, Ltd., is the owner of a shopping center located in an area known as Lloyd Cen-

[1] This and similar references are to the Appendix to the Petition for Certiorari which contains the opinions and judgments of the courts below. The pretrial order printed at pages 16-19 of the Appendix in this Court contains an extensive statement of agreed facts.

ter in Portland, Oregon. A. 16, 17.[2] The privately-owned areas of the Center contain stores, malls, covered walkways, and open and covered areas for automobile parking, but no residences. A. 17, 18.

All streets in and surrounding Lloyd Center are publicly owned and have adjacent public sidewalks. A. 18.[3] The Center is bounded by four such public streets—Broadway Street, Lloyd Boulevard, and Ninth and Sixteenth Avenues. It is crossed by Weidler, Halsey, Multnomah and Holladay Streets running east to west and by Fifteenth Avenue running north to south. At least six other streets run partly into or around the Center. A. 17. In total there are 66 linear blocks of publicly-owned sidewalks in the Center. There is also a public park. Some of the stores open directly onto the public sidewalks or onto the privately-owned mall and public sidewalks. Some open only onto the mall area. A. 18, 63-64. It is not possible to enter or leave the mall area without crossing one of the public streets, and if the individual enters by automobile, he is required to stop his vehicle at the intersection of the exit and the public street and sidewalk when leaving the mall parking area. A. 18-19.

The general location and layout of Lloyd Center and the public streets which adjoin and cross it are shown by the map and aerial photographs which are Exhibits 3, 4 and 5.[4] A. 115-17. The record also contains a number

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[2] "A. ——" references are to the printed Appendix in this Court which contains portions of the record below.

[3] These public streets had been in existence prior to the erection of Lloyd Center. In the course of construction these streets were widened, and other public streets were vacated, Petitioner conveying land of equal area to the City in exchange. A. 11-12, 86-87; Exs. 24-26, A. 193-222.

[4] Respondents' Exhibits are numbered 1 to 28, inclusive, and all were offered in evidence at A. 36-37. Petitioner's Exhibits numbered 51 to 56, inclusive, and 59 and 60, were offered in evidence at A. 76-77, 100-01.

of photographs of the exterior and interior parts of the Center.[5]

Petitioner, which has a very substantial investment in the Lloyd Center facilities, has a great interest in making it an effective shopping center. The privately-owned mall and walkways are designed and decorated to promote retail business, to please customers and to encourage prospective customers of Petitioner's tenants to come there where they may view and buy merchandise. A. 91-92, 98-99, 102. The private malls and walkways are obstructed and interspersed with gardens, flowerbeds, statuary, murals, various other works of art, benches, elevators and escalators, stairways and bridges and directories and information booths. A. 18, 64; Exs. 11 A-V, 55 A-V, A. 129-39, 230-47. Petitioner and its tenants spend approximately $350,000 each year to maintain the privately-owned common areas in the shopping center and to enhance customer motivation. A. 70.

The public sidewalks surrounding and intersecting Lloyd Center, consisting of over 10,000 linear feet, are available for handbilling and related activities, as is the public park which is located in the Center. A. 18-19; Ex. 3, A. 115. In addition, Petitioner maintains an auditorium in the Center which is available for hire by any group. A. 50-51, 102-03.

Petitioner, in accordance with the wishes of its shopping center tenants (A. 97-98; Ex. 59, A. 252), has since the inception of Lloyd Center in 1960 prohibited commercial and noncommercial handbilling in the private areas of the Center (A. 102) because Petitioner has found that it is controversial (A. 101), distracting and

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[5] *See* Exs. 11 A-V, 55 A-V, A. 129-39, A. 230-47. Exhibits 11 A, D, E, G, H, and 55 T are exterior views showing public streets. Exhibits 11 B, I, and J show the lower or basement parking level. The remainder of these photographs are interior views of Petitioner's privately-owned central mall area and walkways. Exhibits 11 L and M show generally the area where the handbilling incidents which gave rise to this case occurred.

detrimental to business and because of the littering that would be caused by discarded handbills.[6] Where individuals have sought to distribute handbills at the Center, they have been requested to do so on the publicly-owned streets and sidewalks. A. 63-64. Following this Court's *Logan Valley* decision in 1968, Petitioner revised its policy to permit handbilling in the privately-owned areas of Lloyd Center so long as that handbilling was related to Petitioner's business or that of its tenants. A. 108. However, Petitioner continued its policy of refusing to allow the distribution of all other commercial and noncommercial handbills in the non-public areas of the Center.[7]

On November 14, 1968, a number of persons, including Respondents, commenced distributing handbills to passersby at various points on the malls and walkways of the privately-owned portions of Lloyd Center. A. 16-17, 72. The leaflets urged opposition to the war in Vietnam and the Selective Service System. In no way did they concern, or in any way relate to, Petitioner's business, that of any tenant in Lloyd Center, or of any activities conducted by anyone on the Lloyd Center premises. Exs. 1 and 2, A. 111-14.

Respondents did not have permission from either Petitioner or any of the Lloyd Center tenants to distribute handbills, such permission having been denied by Petitioner. A. 17. At the time that the distribution was

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[6] A. 7, 46-47, 63, 70-71, 90-92, 97-98. Petitioner has placed signs embedded in the walkways of the private areas that state:

> "NOTICE—Areas in Lloyd Center used by the public are not public ways but are for the use of Lloyd Center tenants and the public transacting business with them. Permission to use said areas may be revoked at any time. LLOYD CORPORATION, LTD." A. 106-07.

[7] Petitioner has allowed certain other activities in the private areas, not involving handbills, because these activities are beneficial to the Center's business and often bring "a great many people to Lloyd Center who may shop before they leave." A. 51. Petitioner paid to get some such attractions. A. 51.

taking place at least two shoppers, and perhaps others, expressed annoyance at Respondents' handbilling activities.[8] The manager of Lloyd Center and security officers employed by Petitioner requested Respondents to cease distributing leaflets in the privately-owned areas of Lloyd Center and suggested that they instead distribute their leaflets in the public streets and sidewalks of the Center.[9] Respondents, and those participating with them in the handbill distribution, eventually moved to the public streets and sidewalks, or left the Center, in order to avoid the possibility of arrest for trespass. A. 17, 73-74, 81-84.

Proceedings Below:

On March 7, 1969, Respondents commenced this action against Petitioner in the United States District Court for the District of Oregon requesting a declaratory judgment and injunction forbidding Petitioner from refusing them permission to distribute noncommercial handbills in the privately-owned areas of Lloyd Center. A. 8-9.

After a trial without a jury, the District Court held for Respondents. The court found that "[i]t is true that under some circumstances, conduct accompanying the distribution of handbills could interfere with Mall business" at the Center, but that there was no such interference in this case because "[t]here was no littering or disturbance." Pet. App. 10a. While recognizing that Respondents' handbilling was in no way related to Petitioner's business or that of any Lloyd Center tenant, and that Respondents' activities interfered to some extent with customers' motivation to buy, the court held that the First Amendment required that Petitioner afford ac-

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[8] A. 48-49, 74, 100. Another shopper expressed the view that Respondents should not be required to leave. A. 75.

[9] A. 17, 72-74. These security officers are commissioned as special police officers by the City of Portland. A. 19.

cess for unrelated handbilling in the private areas of Lloyd Center, relying on this Court's decisions in *Marsh* v. *Alabama*, 326 U.S. 501 (1946), and *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc., supra.* Pet. App. 11a-13a. The court concluded that the "sole distinction between this case and *Marsh* is that this case involves a shopping center whereas *Marsh* involved a town" and that this Court in *Logan Valley* "expressly extended *Marsh* to shopping centers." Pet. App. 13a. The court recognized that "[i]t is true that the court in *Logan Valley* left open the question whether the owner could bar picketing which was not directly related to the use of the center." The court concluded, however, that "[h]ere, Plaintiffs' distribution of handbills was pure speech" and "[i]f *Logan Valley* does not go as far as I suggest, the First Amendment does." Pet. App. 14a.

The court entered a declaratory judgment and injunction broadly barring Petitioner from excluding noncommercial handbilling on its premises.[10] No reference was made to the particular handbills of Respondents in either the declaratory judgment or the injunction. Neither was there any distinction made between the public streets and areas in Lloyd Center and the privately-owned walkways where the handbilling incident occurred. Also, no

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[10] The operative portions of the judgment and injunction read as follows:

> "1. Plaintiffs have a right to distribute non-commercial handbills in a peaceful and orderly manner in the malls and walkways within Lloyd Center at times when they are open to general public access;
>
> "2. For the reason set forth in the Court Opinion dated January 15, 1970, defendant Lloyd Corporation, Ltd., its officers, agents, servants and employees, and those persons in active concert or participation with them who receive actual notice of this declaratory judgment and decree by personal service or otherwise, are enjoined from preventing or interfering with the distribution of non-commercial handbills in a peaceful and orderly manner in the malls and walkways within Lloyd Center at times when they are open to general public access . . . ."

The full text appears at Pet. App. 4a-5a.

distinction was made between handbills bearing a direct relation in their purpose to Petitioner's use of its property and those that do not.

Petitioner sought review in the United States Court of Appeals for the Ninth Circuit which, on July 7, 1971, affirmed in a brief per curiam opinion. The Court of Appeals concluded that, in the light of the District Court's finding that Lloyd Center was "the functional equivalent of a public business district," it was required to affirm because it was "powerless to hold that the critical factual determination which is here involved was clearly erroneous." Pet. App. 2a.

This Court granted certiorari on January 17, 1972.

SUMMARY OF ARGUMENT

In *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), this Court held that the owner of a private shopping center could not bar picketing and handbilling on the premises where these activities were related to the business of one of the shopping center's tenants and there was no effective means of reaching shopping center customers by conducting these activities on publicly-owned streets and sidewalks. Left open was the question of whether handbilling could be barred when it was not "directly related" to the business of a shopping center and, also, the extent to which handbilling might be regulated or controlled under other circumstances.

By contrast, this case raises the question whether a shopping center owner may prohibit handbilling where the handbilling is unrelated to the business of the center and can be effectively accomplished by utilizing public streets and sidewalks adjoining and intersecting the shopping center premises.

The District Court here concluded that Petitioner was required to open its shopping center premises to

Respondents' activities because they constituted "pure speech." However, a long line of decisions of this Court, including *Logan Valley* itself, recognizes that handbilling, like picketing, involves conduct other than speech and "can be subjected to controls that would not be constitutionally permissible in the case of pure speech." 391 U.S. at 313.

Even where public property is involved, there is no absolute right to engage in picketing and handbilling activities, and the State may prohibit such activities in certain areas, such as jail grounds, courthouses, embassies, or other areas peculiarly subject to disruption. Even where the State may not prohibit such activities, it may regulate them to ensure that they cause a minimum of disruption.

The rights of a property owner, though having their origin in state property law, are greater. While an owner of a company town may not exclude handbilling altogether, this Court has sustained the right of a home owner to bar solicitors from his private residence and the right of an owner to bar handbilling from private apartment dwellings.

A shopping center, which falls somewhere between the extremes of a company town and a private residence, is neither absolutely subject to the control of the owner nor is it absolutely open to all those wishing to engage in speech activities. While the rights of free speech and association are important, the interests of Petitioner in controlling the use of its property are neither abstract nor unimportant. If Petitioner is compelled to allow indiscriminate handbilling on its premises, it will be significantly affected. The costs in terms of litter collection alone may be substantial. Moreover, handbilling competes for the time and attention of people Petitioner and its tenants have attracted to their shopping center at substantial expense for their own business purposes, and, as the record in this case reflects, many

shoppers find handbilling to be a considerable annoyance and distraction.

Each case requires an appropriate resolution of the conflicting interests of shopping center owners and those seeking to engage in speech activities on shopping center premises. In three important respects this case is so significantly different from *Logan Valley* as to require a different result:

First, here the handbilling was totally unrelated to Petitioner's business or that of any tenant of Lloyd Center. The distinction between handbilling which is related to the business of the shopping center and that which is not is substantial and, we submit, controlling.

The application of the First Amendment to privately-owned property rests upon the premise that if the owner of property has opened it to the public, he cannot restrict the use of the property in a manner inconsistent with that invitation. Thus, in *Marsh* v. *Alabama*, 326 U.S. 501 (1946), the Court held that an owner of a company town, having opened his property to the general public, was required to afford access for general speech activities. In the case of a shopping center, a different situation prevails. The owner's invitation extends only to that portion of the public which seeks to transact business with those occupying the shopping center premises. While this invitation may be deemed to include those desiring to criticize these businesses, it quite clearly does not extend to those who wish to create a public forum for the discussion of general public issues.

Moreover, where the handbilling is unrelated to the use of the property, it cannot be argued that handbilling on the shopping center premises is necessary for effective exercise of First Amendment rights since the other public areas in the community provide a fully adequate forum to reach the general public. Under such circumstances the concern this Court expressed in *Logan*

Valley that businesses "could largely immunize themselves from . . . criticism by creating a *cordon sanitaire* of parking lots around their stores," 391 U.S. at 325, has no application. In short, the justifications advanced in *Logan Valley* for permitting picketing and handbilling which was directly related to the business of a shopping center do not exist in this case.

Second, although the unrelated nature of the handbilling is in our view dispositive of this case as a matter of law, there is another important factual difference between this case and *Logan Valley* which likewise requires a different result.

Here, unlike *Logan Valley*, there were publicly-owned areas in and around Lloyd Center where Respondents' handbilling could have been effectively conducted.

In *Logan Valley*, the nearest public areas were 350 to 500 feet away from the shopping center. If the handbilling activities had been confined in this area, those engaged in handbill distribution would have had to approach the shopping center customers while they were "moving by car from the roads onto the mall parking areas." 391 U.S. at 322. The Court found that automobiles entering or leaving the center moved "constantly at rates of speed varying from moderate to high" and that "the task of distributing handbills to persons in moving automobiles is vastly greater (and more hazardous) than it would be . . . to pass them out within the [shopping center] mall to pedestrians." *Id.* Lloyd Center, on the other hand, is adjoined and intersected by 66 linear blocks of public sidewalks. All people who enter or leave the private areas of the center must cross the public streets and sidewalks. If they are leaving the parking area by automobile, they are required to come to a complete stop at the intersection of the shopping center exit and the public street and sidewalk. Under these circumstances, we submit, there is no necessity, and hence no

First Amendment right of access, to Petitioner's privately-owned land.

Third, even in cases involving publicly-owned thoroughfares, the State does not lack power to regulate the "time, place and manner" of speech activities. *See Cantwell* v. *Connecticut*, 310 U.S. 296, 304 (1940). Thus, it seems that even a State could preclude handbilling on certain publicly-owned streets as long as other public streets and sidewalks are available for that purpose.

Whether or not this is the case, however, such restrictions are clearly permissible in the privately-owned areas of a shopping center which, like the one involved here, is adjoined and intersected by public streets and sidewalks. We submit that Petitioner's requirement that Respondents distribute their handbills on the publicly-owned areas in Lloyd Center was an entirely reasonable regulation of the "place" of handbilling.

ARGUMENT

THE FIRST AMENDMENT DOES NOT REQUIRE PETITIONER TO MAKE ITS SHOPPING CENTER PREMISES AVAILABLE FOR THE DISTRIBUTION OF HANDBILLS WHICH ARE UNRELATED TO ITS BUSINESS, PARTICULARLY SINCE ADJACENT PUBLICLY-OWNED STREETS AND SIDEWALKS ARE AVAILABLE FOR HANDBILL DISTRIBUTION.

This case presents again for this Court's determination a conflict between an owner's interest in regulating the use of its private business property and the interests of others who seek to use the property for their own purposes of speech and association. Specifically the question here is whether the owner of a private shopping center can prohibit handbilling on the shopping center's premises where the handbilling is unrelated to the business of the center and can be accomplished by utilizing

public streets and sidewalks adjoining and intersecting the shopping center premises.

The courts below held that despite the lack of relation between the purpose of the handbill messages and Petitioner's use of its land, and despite the availability of public streets, sidewalks and a public park in and around Petitioner's shopping center, Petitioner may not enforce its ban on handbilling within the private areas of its shopping center. Apparently, the courts below concluded that because Petitioner invites the public to use its private shopping center property for some purposes, it is required to open its property for all noncommercial handbilling even though the handbilling has no relation to those purposes and in fact interferes with Petitioner's utilization of that property for business.

Initially we point out that the analyses of the District Court and the Court of Appeals were seriously deficient. The decisions below apparently rest upon the erroneous premise that Respondents' activities were entitled to protection because they were "pure speech." Pet. App. 14a. As this Court said in *Logan Valley*, "[h]andbilling, like picketing, involves conduct other than speech, namely, the physical presence of the person distributing leaflets on [Petitioner's] . . . property." 391 U.S. at 315-16. Accordingly, handbilling, like picketing, "can be subjected to controls that would not be constitutionally permissible in the case of pure speech." *Id.* at 313. Moreover, the decisions of this Court make clear that the nature of the property involved, as well as the activities themselves, has a direct bearing on the extent to which these activities can be controlled and even prohibited.

Thus, even where public property is involved, this Court pointed out in *Adderley* v. *Florida*, 385 U.S. 39, 48 (1966), that persons who want to propagandize their protests or views do not "have a constitutional right to do so whenever and however and wherever they please"

and held that such persons could appropriately be excluded from jail grounds, noting that:

> "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. . . . The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose." *Id.* at 47-48.

Where publicly-owned streets are involved the degree of permissible regulation is perhaps more limited. Despite this Court's statement in *Cox* v. *Louisiana I*, 379 U.S. 536, 555 n.13 (1965), that it remains an open question, we assume that any attempt by the State to reserve all publicly-owned streets, sidewalks and parks exclusively for transportation and recreational activities may be unconstitutional under the First Amendment. *Cf. Edwards* v. *South Carolina*, 372 U.S. 229 (1963).

At the same time, the fact of public ownership does not mean that streets must always be made available for the exercise of speech and assembly. The State can properly exclude speech activities at or near courthouses, embassies, or other areas peculiarly subject to disruption. *See Cox* v. *Louisiana II*, 379 U.S. 559, 563-64 (1965); *Cameron* v. *Johnson*, 390 U.S. 611, 616 (1968); *Frend* v. *United States*, 100 F.2d 691 (D.C. Cir. 1938), *cert. denied*, 306 U.S. 640 (1939).

This case, however, does not involve publicly-owned land, and because the rights of private business and private property must be taken into account, the rights of regulation afforded the owner are greater.

Petitioner's right to control its shopping center land has its source in state property law. Traditionally (and under Oregon law), this right is protected by state common law and statutory trespass laws. *See Martin* v. *City of Struthers*, 319 U.S. 141, 147 (1943), where the Ore-

gon trespass statute involved in this case (Ore. Rev. Stat. § 164.460, printed in the appendix to this brief) was cited in support of the statement: "Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off." The rights of private property owners, thus created by state law, are guaranteed by the Fifth and Fourteenth Amendments. *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). Accordingly, as this Court stated in *Logan Valley*, "the rights traditionally associated with ownership of private property" may well permit the owner of private property "to limit the use of that property by members of the public in a manner that would not be permissible were the property owned by a municipality." 391 U.S. at 319.

In the area of handbilling and solicitation, this Court has held that handbillers may not be entirely barred from a privately-owned town, *Marsh* v. *Alabama*, *supra*, or from all private residences regardless of the desire of the owners, *Martin* v. *City of Struthers*, *supra*. *Cf. Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971). On the other hand, it has held that a State may constitutionally bar solicitors from private residences if they are not invited, *Breard* v. *Alexandria*, 341 U.S. 622 (1951), and handbillers from private apartment dwellings where no invitation has been extended, *Hall* v. *Commonwealth*, 188 Va. 72, 49 S.E.2d 369, *appeal dismissed*, 335 U.S. 875 (1948).[11] As this Court said in *Breard* v. *Alexandria*, 341 U.S. at 642:

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[11] The decision in *Hall* v. *Commonwealth* was approved in *Breard* v. *Alexandria*, 341 U.S. at 643-44, and in *Rowan* v. *United States Post Office Dept.*, 397 U.S. 728, 737 (1970). *See also Watchtower Bible & Tract Society* v. *Metropolitan Life Insurance Co.*, 297 N.Y. 339, 79 N.E.2d 433, *cert. denied*, 335 U.S. 886 (1948).

Similarly, although *Martin* v. *City of Struthers* struck down an absolute prohibition on door-to-door handbilling, as we have previously noted, it cited with approval the Oregon trespass statute involved in this case and went on to state: "A city can punish those who call at a home in defiance of the previously expressed will of the occupant." 319 U.S. at 148.

> "Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life."

A shopping center falls somewhere between the extremes of a company town and a private residence. It is not as restricted as a private residence, since it is generally open to those members of the public who desire to come and shop upon the premises. On the other hand, it is not the equivalent of a town since it has no residences, or other attributes of a municipality.

Recognizing that shopping centers stand somewhere between municipalities and private residences, this Court in *Logan Valley* struck a balance which, we suggest, went as far as is appropriate to serve the interests both of the private owner and of those who desire to engage in speech and association upon the premises. In holding that the First Amendment required the shopping center owner to allow the use of its property for union picketing and handbilling, the Court pointed out that entry into the Logan Valley Mall was by vehicle only and that to require the picketers to remain on public property 350 to 500 feet away from the Weis Market would either render their message "indecipherable" or require them ineffectively to handbill and picket "along heavily travelled roads along which traffic moves constantly at rates of speed varying from moderate to high." 391 U.S. at 322. At the same time, the Court emphasized that the speech activities were directed specifically at patrons of the Weis Market located within the shopping center, and expressly reserved the question of unrelated handbilling, stating:

> "The picketing carried on by petitioners was directed specifically at patrons of the Weis Market located within the shopping center and the message sought to be conveyed to the public concerned the

manner in which that particular market was operated. We are, therefore, not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put." *Id.* at 320 n.9.

There were three factors that were specifically discussed by the Court in *Logan Valley* as limitations on its holding. As will be discussed below, Petitioner submits that all three of them apply here, and that each of them independently requires the striking of a different balance and a different result from *Logan Valley*.

1. Where, As Here, the Subject of Handbilling Is Unrelated to the Use to which Shopping Center Property Is Being Put, There Is No Justification for Requiring the Owner To Allow Its Property To Be Used for That Activity.

Under the terms of the District Court's injunction, Petitioner is prevented from excluding from the mall and walkways in Lloyd Center any noncommercial handbilling—whether, as Mr. Justice White foresaw in his *Logan Valley* dissent, it is "for religious purposes, political campaigning, protests against government policies," 391 U.S. at 339, or any other noncommercial purpose. As we have noted, *Logan Valley* itself expressly declined to go so far —a fact acknowledged by the District Court below. Pet. App. 14a.

The distinction between handbilling which is related to the business of a shopping center and that which is not related is substantial and, we submit, controlling.

The related-unrelated distinction finds support in the central rationale of *Marsh* v. *Alabama* itself. That decision rests upon a theory that an owner may not open private property to the general public and at the same time

restrict its use in a manner inconsistent with that invitation. In *Marsh*, this Court stated that:

> "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." 326 U.S. at 506.

In *Marsh*, the scope of the invitation was quite broad since the general public was invited for virtually every general purpose related to life in the town. Accordingly, the Court held that the owner could not exclude general religious handbilling.

Where a shopping center is involved, however, the owner's invitation to the public and the consequent circumscribing of his property rights are much more limited. The public has been invited to shop while the center is open—an invitation clearly limited in terms of time and purpose. Surely no one would contend, for example, that Petitioner must allow an assembly or parade on its property at a time when it is closed for business merely because it is open at other times. Likewise, we submit, by opening its property for shopping purposes Petitioner in no way subjected itself to a duty to provide a public forum for discussion of every public issue.

In *Logan Valley*, Mr. Justice Douglas noted in his concurring opinion that shopping center owners have not dedicated their property wholly to a public use. Rather, they "hold out the mall as 'public' for purposes of attracting customers and facilitating delivery of merchandise." 391 U.S. at 326. Similarly, the Court's opinion limited its holding by stating:

> "All we decide here is that . . . the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and *for a purpose gen-*

erally consonant with the use to which the property is actually put." *Id.* at 319-20. (Italics added.)

Where the handbilling is unrelated to the shopping center's business and the purpose of the speech accordingly is not consonant with the scope of the public invitation issued, Petitioner submits that there is no justification for circumscribing its rights.[12]

Apart from the matter of the scope of the invitation, there is a second important reason for distinguishing between related and unrelated speech. Where speech is directly related to the use of the property in question, the audience to whom the communication is directed, like the Weis Market customers in *Logan Valley*, may be so localized that, as a practical matter, speech to be effective must be allowed on the private property itself. This need for special treatment of related speech was the stated reason for the *Logan Valley* decision. This Court cited examples of "workers seeking to challenge substandard working conditions, customers protesting shoddy or over-

[12] In this case, the scope of Petitioner's invitation to its shopping center was limited. In the words of the District Court, Petitioner opened its "land to the general public for business purposes" (Pet. App. 14a)—*i.e.*, the same as the shopping center owner did in *Logan Valley*. As noted above, signs were embedded in the sidewalks of Lloyd Center stating that "Areas in Lloyd Center used by the public are not public ways but are for the use of Lloyd Center tenants and the public transacting business with them." A. 106-07. The scope of this invitation cannot be viewed as having been substantially broadened by reason of the fact that Petitioner occasionally permitted political candidates and certain stationary solicitors for charitable causes to engage in activities on its premises. Those activities promoted Petitioner's business purpose of attracting customers to its shopping center, and whatever the impact of these activities may be upon Petitioner's right to exclude those wishing to engage in political speechmaking or stationary charitable solicitations, they do not suggest that Petitioner has opened its premises to handbilling activities having nothing to do with the business of its shopping center. Indeed, as the record reflects, Petitioner has always excluded both commercial and noncommercial handbilling from its premises (A. 102), except to the extent required by *Logan Valley* (A. 108).

priced merchandise, and minority groups seeking nondiscriminatory hiring policies," 391 U.S. at 324, as reasons for its decision that pickets and handbillers conveying such related messages could not be required to stay on public lands removed from the source of the controversy. If the result were otherwise, this Court noted it might be possible for businesses to immunize themselves from criticism, a result at odds with the "goal of free expression and communication that is the heart of the First Amendment." *Id.* at 325.

A completely different situation prevails where, as here, handbilling activities are totally unrelated to the use of the private property involved. In these circumstances, this Court's concern that shopping center businesses "could largely immunize themselves from . . . criticism [of their practices] by creating a *cordon sanitaire* of parking lots around their stores," *id.*, has no application. In this case, Respondents were not seeking to criticize Petitioner or any of its tenants. Respondents' handbills advocated resistance to the draft and advertised a meeting to be held in another part of Portland. *See* Exs. 1 and 2, A. 36-37, 111-14. To deny Respondents the opportunity to present their antidraft views on Petitioner's property in Lloyd Center produces none of the consequences which caused the result in *Logan Valley*. The Lloyd Center property of Petitioner will still be open for criticism of the business carried on there. And, even if there were no publicly owned areas in Lloyd Center available for Respondents' unrelated speech activities (which, of course, there are as discussed in the next part of this brief), the other public areas in the Portland community provide a fully adequate forum to reach the general public with messages having nothing to do with the activities of Petitioner and its tenants.

The interests of a shopping center owner in prohibiting handbilling are significant. Petitioner has a significant claim to "protection of the normal business operation of

the property" against Respondents' unrelated handbills, and more than "naked title" is in issue here. *Cf. Logan Valley*, 391 U.S. at 324. Handbilling may result in substantial business loss. The costs in terms of litter collection alone may be substantial. Petitioner and its tenants have, at great expense, designed and maintained the private areas in the Center to make it attractive, comfortable and convenient for shoppers. Handbilling competes for the time and attention of people Petitioner and its tenants have attracted to Lloyd Center at substantial expense for their own business purposes. The tenants, whose rent is Petitioner's sole source of income, have consistently objected to handbilling. A. 97-98; Ex. 59, A. 252. The uncontradicted evidence in this case, acknowledged by the District Court (Pet. App. 10a-11a), is that handbilling is controversial and distracting and that it interferes with customer motivation to buy. This customer motivation—and the goodwill of tenants which it generates—is critical to Petitioner's business.

The adverse impact on the business of Petitioner and its tenants is heightened by the breadth and indefinite nature of the injunction issued in this case. For the future, Petitioner is broadly enjoined, not just from interfering with Respondents' handbilling but with anyone's noncommercial handbilling, regardless of content. No matter how controversial, offensive, distracting, or extensive, Petitioner must permit all noncommercial handbilling, so long as it is distributed "in a peaceful and orderly manner."

In summary, the burden and inconvenience imposed by allowing private property to be used for criticism of business conducted thereon may be justified as necessary to inform the public, as consistent with the invitation opening the property to the public for business purposes, and as a reasonable incident and part of the cost of the business being conducted. But there is no such justification for imposing that burden and inconvenience on pri-

vate property owners when the message has no relation to the business being conducted there, and can be communicated to the public elsewhere. A private property owner should not be required, against its own interests, to bear the burden and expense involved in providing a forum for general noncommercial communication having nothing to do with the use being made of its property. Only recently this Court, in another context, stated:

> "Nor should we forget that the Constitution expressly protects against confiscation of private property or the income therefrom." *Lindsey* v. *Normet*, 40 U.S.L.W. 4184, 4190 (Feb. 23, 1972).

But the injunction in this case is essentially inconsistent with that constitutional protection, and it should not be permitted to stand. The justifications which may be advanced for constitutionally requiring shopping center owners to allow the use of their land for handbilling, when it is directly related to the business being conducted on their premises, simply do not exist when the handbills have nothing to do with that business. This factor alone is, we submit, dispositive of this case as a matter of law. However, there are two additional distinctions between this case and *Logan Valley* which likewise require reversal of the decision below, and it is to those additional distinctions that we now turn.

2. The Petitioner Should Not Be Required To Open Its Lands for Handbilling Because the Public Areas Available in the Center and Elsewhere Make Such Use of the Privately-Owned Land Unnecessary.

A second important distinction between this case and *Logan Valley* is that here, unlike the situation in *Logan Valley*, there are public streets and sidewalks available in and around the shopping center for effective distribution of Respondents' handbills. The relevance of this has been noted in *Logan Valley* and other cases dealing with the extent to which private property must be made available for speech and association activities.

For example, in *NLRB* v. *Babcock & Wilcox Co.*, *supra*, this Court held that an employer could exclude union handbillers from its private business property because those handbillers could, with reasonable effectiveness, accomplish their purpose by communicating their message elsewhere in the community, and it was not necessary for them to use the private land. In reaching that result, the Court pointed out that organizational rights "are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." *Id.* at 112.[13]

In this case, as noted above, all public areas in the entire metropolitan area of Portland, as well as the public areas in and around Petitioner's shopping center, were available for distribution of the Respondents' unrelated handbill message. This case is therefore unlike *Marsh* v. *Alabama*, *supra*, where the entire community was privately owned. Likewise, this case is distinguishable from *Logan Valley* since the extensive public streets, sidewalks and the public park available for handbilling in Lloyd Center make it unnecessary for Respondents to use Petitioner's land.

In *Logan Valley*, the nearest public lands were berms 350 to 500 feet away from the Weis Market, and Weis customers entered the premises by vehicle. The Court found that if the picketers and handbillers were banished to those lands their signs would be "virtually indecipherable" because they would have to be read at that distance "or while the prospective reader is moving by car from

[13] As to the use of company property for organizational purposes in other circumstances, however, compare *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945). A facet of the use of an employer's property for organizational purposes under the National Labor Relations Act is, of course, before this Court in *Central Hardware Co.* v. *NLRB*, *cert. granted*, 40 U.S.L.W. 3314 (Jan. 10, 1972) (No. 70-223).

the roads onto the mall parking areas via the entrance ways cut through the berms." 391 U.S. at 322.

This consideration is simply not present here. Lloyd Center is bordered and crossed by publicly owned sidewalks that abut the buildings. In all, there are 66 linear blocks of public sidewalks with bus-stops and pedestrian crosswalks located thereon.

All people who enter or leave the private areas on Petitioner's land must cross the public streets and sidewalks. They may do so on foot or in automobiles. When leaving the privately-owned area parking lots, automobiles are required by law to come to a complete stop at the intersection of the exit and the public street and sidewalk. Handbills could have been distributed, not only to pedestrians, but also to occupants of automobiles from the public streets and sidewalks with considerable ease and without significant hazards to those engaged in the distribution.[14] Respondents did, in fact, move to the public areas to complete distribution of their handbills. In *Logan Valley*, as noted above, the situation was significantly different. Not only was all entry by vehicle, but this Court found that the automobiles entering and leaving the mall moved "constantly at rates of speed varying from moderate to high" and that "the task of distributing handbills to persons in *moving* automobiles is vastly greater (and more hazardous) than it would be . . . to pass them

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[14] While the District Court found that Respondents could not as effectively achieve their purposes by distributing their handbills in the public areas of Lloyd Center, the District Court based this conclusion on its finding that "[m]any customers do not use the public sidewalks and streets except when entering the Mall by automobile." Pet. App. 11a. The District Court did not refer to the agreed facts that automobiles are required by law to stop at the public streets when leaving Petitioner's premises (A. 18), and apparently did not consider whether the Respondents could effectively distribute handbills to automobile occupants as they stopped at the public streets on departing Lloyd Center.

out within the mall to pedestrians." 391 U.S. at 322. (Italics added.)

Everyone shopping at Lloyd Center was available to receive Respondents' handbills. Although it might have been easier for Respondents to distribute their handbills inside Petitioner's premises instead of in the public areas, Respondents have not and cannot demonstrate any necessity for doing so. In these circumstances, there is no reason for depriving Petitioner of its substantial interests in preserving its carefully designed and managed private areas for business use.

3. The Petitioner's Policy of Limiting Handbilling to the Public Areas in Lloyd Center Is a Proper and Constitutionally Permissible Regulation of the "Place" of Handbilling.

As we have discussed, even in cases involving publicly-owned thoroughfares, it is established that the State does not lack power to regulate the place and manner of handbilling. As this Court said in *Cantwell* v. *Connecticut*, 310 U.S. 296, 304 (1940), "a State may by general and non-discriminatory legislation regulate the time, *the places*, and the manner of soliciting upon its streets, and of holding meetings thereon." (Italics added.) *See also id.* at 306-07; *Cox* v. *New Hampshire*, 312 U.S. 569 (1941); *Poulos* v. *New Hampshire*, 345 U.S. 395 (1953); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949).

Thus, it would appear that even a State regulation limiting handbilling to certain publicly-owned streets would be permissible under the First Amendment, so long as other public streets and sidewalks were available for that purpose. Whether or not this is the case, however, such restrictions are clearly permissible in the privately-owned areas of a shopping center.

In its *Logan Valley* decision this Court recognized that private property owners, and at their behest the State, are not "without power to make reasonable regu-

lations governing the exercise of First Amendment rights" on shopping center property. 391 U.S. at 320. The Court said, "[c]ertainly their rights to make such regulations are at the very least co-extensive with the powers possessed by States and municipalities, and recognized in many opinions of this Court . . . ." *Id.* The scope of regulation and its relation to the particular circumstances involved was further recognized in *Taggart* v. *Weinacker's, Inc.*, 397 U.S. 223 (1970), which dismissed as improvidently granted a writ of certiorari to review an injunction against picketing on a store owner's premises. In so doing, this Court said that, even if under *Logan Valley*, "the union had a First Amendment right to picket on the property involved in this case, a matter that we need not decide, in final analysis we would come down to whether, in light of the physical circumstances of this narrow sidewalk at the store entrance," regulation of the picketing would be permissible. *Id.* at 225.

Under the circumstances of this case—which as we have shown are significantly different from those involved in *Logan Valley*—the requirement that handbilling be carried on in the public areas of Petitioner's shopping center can be fairly characterized as permissible "regulation rather than . . . suppression." *Cf. Logan Valley*, 391 U.S. at 321. We therefore submit that, given the public areas in and around Lloyd Center and elsewhere in the City of Portland, it was entirely reasonable for Petitioner to regulate the "place" of handbilling at Lloyd Center by confining this handbilling to the public areas in Lloyd Center, which include sidewalks, crosswalks, bus-stops, a public park, and other public areas traditionally used for this purpose. On this ground alone, we suggest, this case is distinguishable from *Logan Valley*, and the decision below should be reversed.

But we need not rest on this ground alone. We have pointed out that three factors are present in this case

which were specifically discussed as limiting the holding in *Logan Valley*—the lack of any relation between Respondents' handbills and the business being conducted by Petitioner and its tenants, the lack of any necessity for Respondents to use Petitioner's property to reach the public at Lloyd Center with their anti-draft views, and the reasonableness of restricting Respondents to the public areas in Lloyd Center as a permissible regulation of the place of handbilling. We submit that each of these factors alone compels a different result from that reached in *Logan Valley*, and, when they are considered in combination, there can be no doubt that reversal is required.

CONCLUSION

For the reasons stated, the judgment below should be reversed.

Respectfully submitted,

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March 2, 1972

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment I

"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment V

"No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes

United States Code, Title 28, § 1343. Civil rights and elective franchise.

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * *

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress

providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. . . ."

United States Code, Title 42, § 1983. Civil action for deprivation of rights.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any . . . person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Oregon Revised Statutes § 164.460. Entry on lands and refusal to depart; what constitutes inclosure.

"(1) Any person, other than an officer on lawful business, who goes or trespasses upon any inclosed lands or premises not his own, and upon verbal, written or printed notice of the owner or person in lawful occupation of the lands or premises fails or refuses to depart therefrom immediately and remain away until permitted to return, shall be punished upon conviction of a fine of not more than $50."

Portland City Ordinance § 16-613. Trespass.

"(a) It is unlawful for any person other than an officer on lawful business wilfully to trespass upon or damage any real or personal property of another.

"(b) It shall be deemed a trespass under this section to enter or be upon any enclosed real property without

the consent, express or implied, of the owner or lawful occupant of the real property.

"(c) It shall be deemed a trespass under this section to enter or be upon any real property not enclosed when upon oral, written or printed notice of the owner or lawful occupant of the real property, the person entering or being thereon fails or refuses to depart therefrom immediately and remain away until permitted to return."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-492

MOTION FILED

MAR 8 1972

LLOYD CORPORATION, LTD.,
Petitioner,

v.

DONALD M. TANNER, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT MOTION FOR LEAVE TO ENGAGE IN ORAL ARGUMENT

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JOINT MOTION FOR LEAVE TO ENGAGE IN ORAL ARGUMENT

Homart Development Co. ("Homart") and Roger Jon Diamond ("Diamond"), the petitioner and principal respondent respectively in *Homart Development Co.* v. *Diamond*, No. 1469, *jt. pet. reh. den.*, March 6, 1972 (the Chief Justice and Mr. Justice Blackmun being of the opinion that the motion should be granted), hereby respectfully move for leave to engage in oral argument of the instant case as provided for in Rule 44(7) of the Rules of this Court.[1] This motion is based on the following reasons:

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[1] Homart is simultaneously herewith filing a motion for leave to file a brief *amicus curiae* and brief *amicus curiae* in support of the petitioner. Diamond intends to file, within the time limits provided by Rule 42, a similar motion, if needed, and brief *amicus curiae* in support of the respondents.

1. Homart and Diamond are uniquely qualified to provide assistance to this Court that is not otherwise available. The litigation in No. 1469 raised recurrent and important questions, critical to an appropriate resolution of this controversy, apart from those presented by the parties hereto. For example, by granting this motion, the Court would gain the experience of Homart and Diamond's views on such additional significant aspects of the present dispute as (a) whether, in the case of the *enclosed interior mall* of a *typical* shopping center, a similar or different rule of law should prevail; (b) whether, where a shopping center has *uniformly* prohibited the use of its premises for unrelated non-commercial free speech activities, a similar or different result is required; (c) whether the decision of the Court in the present case has equal force to an initiative solicitation campaign where the alternative channels of communication available are both less numerous and less effective; and (d) whether, if the decision below is affirmed, shopping centers may nevertheless restrain *in advance*, by means of the unilateral promulgation of "reasonable regulations, the exercise of First Amendment activities".

2. In addition to the insights they have gleaned as a result of the controversy in No. 1469, Homart and Diamond have also engaged in other litigation which may be of benefit to the Court. Homart has thus successfully argued to the Rhode Island courts that it may bar campaigning by political candidates at one of its shopping centers (*Homart Development Co.* v. *Fein* (R.I. Super.Ct. Aug. 6, 1971), *app.pend.*, No. 1174-A (R.I.Sup.Ct.), reprinted at pp. 16a-22a of the present pet. for cert.) and participated as an *amicus* in both this case when it was before the Ninth Circuit and the related dispute in *Taggart* v. *Weinacker's*, 397 U.S. 223 (1970). Diamond has also valuable experience. He has represented the petitioner in *Ball* v. *California*, —— U.S. ——, 30 L.Ed. 2d 189 (No. 71-209; Oct. 26, 1971), in which this Court denied review (Mr. Justice Douglas being of the opinion

that certiorari should be granted) of the conviction of a petition solicitor for engaging in peaceful First Amendment activities on the public parking lot of Disneyland; the defendant in *People* v. *Brayshaw*, No. A-332 (Riverside City, Cal. Super. Ct.) (Nov. 30, 1971), in which the trespass conviction of another petition solicitor, on the basis of that he had refused to agree in advance to the regulations issued by a shopping center, ultimately was reversed; the plaintiffs in *Brayshaw* v. *Sears, Roebuck and Co.*, No. WEC 24032 (Los Angeles City, Cal. Super. Ct.), a case in which Sears has been enjoined from prohibiting certain free speech activities on the public parking lot of one of its free-standing stores; and People's Lobby as an *amicus* in *Chumley* v. *Santa Anita Consolidated, Inc.*, 15 Cal. App. 3rd 452,—Cal.Rptr.—(1971), where *Logan Valley* was held not to sanction the sale of newspapers at a race track. Homart and Diamond, as a result, are able to delineate for the Court multiple areas of substantial importance that may be outside the expertise of the parties in this case.

WHEREFORE, in order that the Court may have their unique assistance should it choose to consider other important aspects of the issues here involved and thus further elucidate this important area of the law, Homart and Diamond pray that this joint motion be granted.

Respectfully submitted,

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MOTION OF THE AMERICAN RETAIL FEDERATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF OF THE AMERICAN RETAIL FEDERATION, AS AMICUS CURIAE, IN SUPPORT OF THE PETITIONER

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MOTION OF THE AMERICAN RETAIL FEDERATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Retail Federation ("Federation") hereby respectfully moves for leave to file a brief as *amicus curiae* in the instant case as provided for in Rule 42 of the Rules of this Court. While the consent of counsel for Respondents has been obtained, Counsel for Petitioner has refused his consent.

INTEREST OF THE FEDERATION

The Federation is an organization composed of seventy-eight national and state retail associations. The membership of these associations consists of a wide variety of

retail businesses ranging in size from small local stores to large national chains, representative of all aspects of the retail industry. Through these associations, the Federation represents approximately eight hundred thousand retailers with close to six million employees.

The question presented in the instant case is a matter of continuing importance to the Federation.[1] Briefly stated, that question is whether the owner of a private shopping center has a Constitutional obligation to make available such property for the use of those who desire to espouse any ideas thereon and notwithstanding the availability of effective alternative locations to engage in such activities.

Shopping centers can be of practically any size, ranging from a collection of large national retail operations to local, neighborhood centers with but a few small independent stores. In fact, the characteristics of a shopping center do not materially differ from other types of retail enterprises, such as discount houses or large department stores, which are not generally regarded as "shopping centers." The interest of the Federation is thus predicated on the substantial and far-reaching consequences that any decision here may have for all methods of retail operation. The Federation is also concerned that this Court should be aware of the manifold ramifications of any requirement that retailers, by necessarily opening their property to business invitees, thereby become obligated to permit their property to become a battleground for a variety of controversial competing uses. For these reasons, the Federation requests this opportunity to present its views on the instant case to this Court.

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[1] The Federation, for example, has submitted briefs *amicus curiae* to this Court in the related cases of *Amalgamated Food Employees Union, Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Taggart* v. *Weinacker's*, 397 U.S. 223 (1970); *Central Hardware Company* v. *N.L.R.B.*, No. 70-223; and *Homart Development Co.* v. *Diamond, et al.*, No. 1469.

CONCLUSION

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompanying *amicus* brief in the present case in support of the position of the Petitioner.

Respectfully submitted,

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BRIEF OF THE AMERICAN RETAIL FEDERATION, AS AMICUS CURIAE, IN SUPPORT OF THE PETITIONER

This *amicus* brief is filed by the American Retail Federation contingent upon the Court's granting the foregoing motion for leave to file a brief as *amicus curiae*.

INTEREST OF THE AMICUS CURIAE

The interest of the Federation is set out at pp. 1-2, of the foregoing motion for leave to file a brief as *amicus curiae*.

ARGUMENT

INTRODUCTION

In this case, together with two others currently pending before this Court and raising the same or related

issues,[1] an opportunity is afforded to resolve a conflict between competing rights guaranteed in the First, Fifth and Fourteenth Amendments of the Constitution of the United States. Efforts by various inferior courts to effect such a resolution have given rise to a variety of inconsistent opinions[2] resulting largely from those courts' attempts to apply decisional authority of this Court, whose holdings themselves do not readily mesh, to situations for which those decisions were not intended to provide a solution.

Specifically, the Constitutional conflict presented occurs when groups assert the right to engage in First Amendment activity on the private property of an unwilling owner for purposes unrelated to the uses for which the property was intended and is put, while the owner seeks to limit such a claimed right to the use of his property in reliance on the property rights which are created by state law and which are recognized and guaranteed in the Fifth and Fourteenth Amendments. The diversity which has resulted from courts' efforts to adjudicate these competing claims is a product of their disagreement as to the meaning and scope of this Court's decision in *Marsh* v. *Alabama*, 326 U.S. 501 and *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308.

The court below read these cases to require a privately owned shopping center to permit its premises to be used by any group desiring to engage in any First Amendment activity without regard to the preference of the

[1] *Central Hardware Company* v. *N.L.R.B.*, No. 70-223, October Term, 1970, certiorari granted; *Homart Development Co.* v. *Diamond, et al.*, No. 1469, October Term, 1970, (petition for rehearing pending). The American Retail Federation has also filed briefs *amicus curiae* in each of these cases as well as previously in *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308, and *Taggert* v. *Weinacker's*, 397 U.S. 233.

[2] See, for example, pp. 9, 10 of the Petition for Writ of Certiorari herein.

owner, or to the inconvenience or the increased cost or the loss of income which might result, and without regard to the concurrent availability of reasonably equivalent alternative non-private sites for the exercise of the desired First Amendment activity.

It is submitted that neither sound policy nor any decision of this Court compels or warrants such a result; to the extent a contrary inference may be drawn from the language of any such decision, this Court should take appropriate corrective action.

A. The Meaning and Limits of Marsh and Logan Valley.

The court below gleaned from *Marsh* and *Logan Valley* the rule that private property which is opened to the public for the transaction of business becomes the "functional equivalent of a public business district" and, as such, becomes subject to the same exercise of First Amendment rights as municipal property. In effect, according to this conclusion, any such private property becomes a kind of town square in which all varieties of charitable, religious, paternal, social and political groups may use the property for any form of solicitation or discussion of any subjects not themselves unlawful or likely to result in injury to persons or property.

In *Marsh*, however, this Court held only that private property may be converted to a public use when the alternative is to prohibit any effective First Amendment communication. Thus, in *Marsh*, the entire town was privately owned and the single area in which groups of persons congregated was a business district extending for only one block between streets leading to highways. Accordingly, denial of access to the business district would be equivalent to a total denial of an opportunity for reasonably effective communication with the inhabitants of the town. In determining to treat the privately owned town as if it were an ordinary municipality, the Court created a rationale which would give effect to the

guarantees of the First Amendment. To say thereafter that the business district of this company-owned town was the "functional equivalent" of a public business district is a description of the situation in *Marsh*, but not a general rule of law. Indeed, the holding of *Marsh* is very narrow. It stands for the proposition that, for First Amendment purposes, a company-owned town is like an ordinary town—a rule which is surely inapplicable here. The broadest principle for which *Marsh* may be said to stand is the proposition that where private property constitutes the functional equivalent of public property then First Amendment obligations are incurred by the owners of the property. But when does such a "functional equivalence" occur? *Marsh* provides no answer beyond a reference to its unique facts in which the private property is *intended* to function analogously to public property. Significantly, Justice Black, the author of the Court's opinion in *Marsh*, stated his view, in his dissent in *Logan Valley*, that such "functional equivalence" occurs

> ". . . when that [private] property has taken on *all* the attributes of a town, *i.e.*, 'residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated'." (Original emphasis)

In short, neither the facts, the language, the results, nor the author of *Marsh* provides support for the view, adopted below, that private property intended and used only as a shopping center is the "functional equivalent" of municipal property for the exercise of non-property-related First Amendment purposes *where effective alternative public sites are also available.* Rather, the underlying basis of *Marsh* was that there must be *some* place where inhabitants of a town or city may effectively be reached by those seeking to engage in First Amendment communication.

> "Many people in the United States live in company-owned towns. These people, just as residents of mu-

> nicipalities, are free citizens of their state and country. . . . To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizens." (326 U.S. at 508, 9.)

In a situation such as existed in *Marsh*, where, all the property being privately owned, the problem of obtaining free and uncensored information was real, there was a reasonable necessity to treat portions of that property as if they were public. However, in the ordinary municipality, where effective avenues exist for the dissemination of such information without the danger of limitation through the private control of all effective means of communication, that necessity does not exist. *Marsh*, therefore, does *not* stand for the proposition that every privately owned "business block or district" of every town should be converted to public property for First Amendment purposes.

Nor does *Logan Valley* so hold or suggest. After recognizing expressly that the private owner of a shopping center may well possess the right to limit the use of his property in a manner that would not be permissible were the property owned by a municipality, the Court rendered a quite narrow holding:

> "All we decide here is that because the shopping center serves as the community business block 'and is freely accessible and open to the people of the area and those passing through,' Marsh v. Alabama, 346 U.S. at 508, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put."

While citing *Marsh*, the Court in *Logan Valley* appeared to go beyond the former decision by requiring private property to serve as if it were public when a desired First Amendment use is "generally consonant with the use to which the property is actually put" rather than because of the unavailability of effective alternative public means of communication. However, the distinction in criteria is more apparent than real. For the Court's opinion in *Logan Valley* reveals that its principal concern was that a business entity should not be able to "immunize" itself from "criticism." Thus, the Court noted that absent access to the Logan Valley Plaza the First Amendment purpose would have been thwarted; the pickets involved would have been forced to carry their message at such a distance from those sought to be reached, and under such adverse circumstances, as to be without impact altogether. And with respect to picketing at any other location, the Court observed that such picketing would be subject to the secondary boycott proscriptions of the National Labor Relations Act. Accordingly, in *Logan Valley*, the only effective site for the First Amendment activities sought to be engaged in was the private shopping center property itself. So interpreted, *Marsh* and *Logan Valley* are rendered consistent and compatible with one another.

Similarly, by framing the rule under which private property is impressed with a public character to focus upon a "generally consonant" use, the Court in *Logan Valley* appears only to have expressed as a legal principle the assumption that where a relationship exists between a First Amendment purpose and a property's use, then that property is the only effective site for the realization of that purpose. Although there are situations in which this assumption is justified, in an era of increasingly sophisticated use of public media, the situations in which it is not warranted do, or will, predominate.

Nor should it be presumed that this assumption is particularly appropriate to "shopping centers," whose diversity in function and purpose precludes treating them as if they were alike for any—including First Amendment—purposes. For example, there are many retail establishments which offer not only their own merchandise, but also the merchandise of others through leased departments or concessions and which have parking areas open to the public; there are large free-standing retail stores, frequently associated with or part of national retail concerns, located on their own tract of land with public parking area; there are retail enterprises which, instead of being constructed on a horizontal plane, as in the case of suburban shopping centers, are constructed on a vertical plane due to space limitations such as those existing in downtown urban areas; there are multiple stores, businesses and offices located within a single building with a common entranceway, stairwell and corridors, and multiple manufacturing or retail establishments located within industrial parks and connected only by means of a series of private roads fronting one public artery. All such enterprises, regardless of size, shape or the terms used to describe them, are open to the community and function as "shopping centers", and may thus be subject to the same demands as those which gave rise to the instant case. However, the social role of a huge shopping complex in a small town otherwise lacking a "town square" or another "business district" is entirely different from its role in an urban community and different, too, from the role of a complex of two or three small stores in the heart of a large city or a single free-standing store with adjoining parking facilities. Yet, all of these distinctive entities are "shopping centers", or constitute "business districts", or "town squares." [3]

[3] See, for example, *Diamond* v. *Bland*, 3 Cal. 3d 653, 477 P.2d 733 (1970), pending in this Court on Petition for Rehearing sub. nom. *Homart Development Co.* v. *Diamond* (No. 1469, O.T., 1970); *Central Hardware Co.* v. *N.L.R.B.*, now pending in this Court on writ of certiorari (No. 70-223, O.T., 1970).

and would thus equally be subject to First Amendment use unrelated to the purposes of the private property according to the extension of *Logan Valley* effected by the court below and those others which similarly misinterpret the breadth of *Logan Valley* and its relationship to *Marsh*.

In sum, in this age of increasingly vocal dissent and social polarization it is particularly important to define the extent to which owners of property onto which the public is invited to do business should be required to permit their property to become a battleground for opposing viewpoints, inconsistent or contrary to the purpose for which the property was designed and maintained. This Court's decisions in *Marsh* and *Logan Valley*, whose distilled holdings could guide the lower courts to a uniform and fair balance between the competing rights involved, have not succeeded in doing so. For courts have seized upon their rhetoric, rather than their logic, have raised descriptive terms to the status of rules of law, and have then applied them to entities called "shopping centers" or "business districts" as if the business configurations represented by these terms were rationally susceptible to such uniform treatment. A compelling need therefore exists both to reconstruct a principle or series of principles to govern this area and to discontinue reliance on concepts which are inappropriate to a resolution of the situations to which courts have, with increasing difficulty and confusion, applied them.

B. A Proposed Rule Which Harmonizes the Authorities and Fairly Accommodates Competing Constitutional Claims.

As has been noted, courts' analysis of the impact of the First Amendment upon the right of private landowners reasonably to restrict the use of their premises has suffered from two infirmities. First, cases have been decided either on the basis of "rules" or "tests" which

were only descriptions of results reached in particular factual contexts or on the basis of assumptions which were elevated to the status of rules of law. And second, courts have tended, as did the court below, to ignore this Court's direction in *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, to reach an accommodation with as little destruction of one competing right as is consistent with the maintenance of the other.

The Federation believes that a fair and reasonable analysis of the principal decided authorities concerning the instant issue, in the light of the direction of *Babcock & Wilcox*, yields a rule of law fairly balancing the competing interests without reliance on descriptive rules and legal fictions:

> Owners of private establishments catering to the public may deny the use of their premises to those who wish to use those premises for First Amendment activities unrelated to the purpose for which the public is invited *except* when no reasonably effective alternative means of communication is available.

This rule achieves a fair balance between the opposing Constitutional grants.[4] Those wishing to exercise First Amendment rights are *guaranteed* the right effectively to do so, including, as a last resort, the *right* to use others' private property; those who own property may limit the propaganda use to which strangers may put that property, except when no other reasonably effective means is available for the expression of legally permissible views.

In practice, courts have followed this rule irrespective of the rhetoric they have employed. Thus, in *Marsh* v. *Alabama*, the use of private property was permitted since, all the town's property being private, *no* alterna-

[4] Such a rule would similarly apply to and resolve the related disputes in *Central Hardware* (No. 70-223) and *Homart* (No. 1469) currently also pending before this Court.

legitimizing the public use of private property. Nor should such public use be barred, without further inquiry, because there exists no such general consonance. Let it be assumed, as a variation of the facts in *Wolin*, that servicemen bound for Vietnam were assembled as a group only in a private restaurant located in a shopping center, but that their times of departure were so staggered that *nowhere else* would they appear as a group. Would it not be reasonable to permit an anti-war demonstration directed to them to be conducted on center property near the restaurant's premises, irrespective of the fact that the uses to which the center and restaurant are put are *unrelated* to the purpose of the demonstration, simply because no other site and time affords an effective means of communication with those servicemen? Conversely, would it not also be reasonable to bar such demonstrations on private property, even though the use of that property is directly related to the purpose of the demonstration, when it appears that there *do* exist reasonably effective alternative means to achieve the same communication without invading private property?

Apart from achieving a fair balance of competing rights without destroying either, the proposed rule yields additional benefits. The holding of the court below allows every group or cause which would be permitted in a public park to come upon private shopping center premises, subject to reasonable regulation.[6] Given the virtually unlimited number of such groups and causes and the potentially divisive and inflammatory effect many would have on their consumer audience, the problem of "regulation" becomes a very serious one.[6] While the proposed rule would not avoid that problem altogether, the

[6] In addition to judgmental decisions seeking the least disruption of center business consistent with effective First Amendment use, "regulation" also involves maintenance and policing costs which must be borne by those whose businesses are, to some extent, being disrupted. There is also the matter of liability for injury both to consumers and to those seeking to exercise First Amendment rights, and added insurance costs, among other problems and costs related to or involved in such "regulation".

mere fact that it would limit the number of such incursions to those instances where no reasonably effective alternatives exist would render that problem more manageable and susceptible of a more relaxed and thoughtful disposition whenever it did arise.

Nor would courts become flooded with suits seeking a determination of the validity of the multitude of varying regulations which the various "shopping centers" would otherwise continually be required to improvise.

On the other hand, failure to adopt a rule such as that proposed here in favor of a continuing reliance upon concepts such as "generally consonant use," or "functional equivalent" of public property, or "quasi-public" "business blocks" will involve the judicial system in an increasing volume of legal hair-splitting, and will substitute diversity for clarity. For example, whereas a shopping center catering to and admitting all members of the public has been described as the functional equivalent of public property, would the same apply to the property of a wholesale operation which neither invites nor services the public at large? Where an office building provides a mall or lobby area for the use of its tenants and their guests, does such a mall become the equivalent of public property or a part of a "business block" such that strangers may assert unrelated First Amendment rights? If such property is not deemed converted to public property, may strangers nonetheless Constitutionally require the use of such a mall where their purpose is "generally consonant" with the property's use? Does the parking lot of a shopping center or public amusement center lose its character as a "business district" subject to competing First Amendment uses when the center charges an admission or parking fee? At least one court has concluded that it does, and this Court subsequently denied certiorari.[7] However, the fact that the center requires this fee

[7] *Ball* v. *California*, —— U.S. ——, 30 L.Ed 2d 189 (No. 71-209, Oct. 26, 1971).

neither affects its business role or purpose nor its social role in the community. By analogy to *Wolin* and *Hoffman*, *supra*, do the premises of a privately owned and operated utility become subject to unrelated First Amendment usese by virtue of their similarity to an instrumentality of the state? Do such premises become less "public" if a charge is assessed for the use of the parking facilities surrounding the utility? Do state regulated and licensed business enterprises become "public" by analogy to *Marsh* or *Wolin* or *Hoffman?*

In short, an approach to the resolution of claims of competing Constitutional guarantees which focuses on fictional concepts such as "quasi-public" or "functional equivalence" invites judicial discord since the decisional variables lack even intuitive appropriateness to the problems they are supposed to resolve.

This is particularly true since the same courts which would be faced with the determination of what those tests require in an almost infinite variety of factual contexts involving attempted public use of private property are simultaneously also faced with this Court's teaching that even the State may prohibit peaceful First Amendment uses on its (*i.e.*, public) property despite the fact that the place chosen is "particularly appropriate" (*generally consonant?*) for such uses.[8]

Rather, if the value of a guaranteed property right is not to be vitiated, that right must include the authority to exclude all who seek to use it for purposes other than that for which the owner intends it *unless* the exercise of that right *prevents* the effective exercise by others of First Amendment activity. Also included in such control is the authority to choose what forms of First Amendment activity shall be permitted on the property and which shall not. When the owner of property believes

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[8] *Adderly* v. *Florida*, 485 U.S. 39, 47; *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 500.

that the commercial value of his property, or his profit, will be enhanced by the exhibit of a certain attraction or an invitation to a specific, even controversial, speaker, he should not be required to make the same premises available to others who, in his view, would not produce the same benefit. Otherwise, the worth of his property right becomes diminished to the significant extent that the effort to increase its value or productiveness converts it, automatically, to public property burdened with the same duties which affect the State's property. All this is subject, as has been stated before, to the assumption that those who would seek to come upon commercial private property catering to the public do have reasonably effective alternative means for the achievement of their First Amendment objectives.[9] If they do not, the rights of property to that extent become subordinated. And upon a showing by those who seek access to such property that they have made reasonable efforts to utilize such alterna-

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[9] For a partial description of such means see, e.g., the various means of expression described at footnote 1 of *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956). Moreover, as a pre-*Logan Valley* study by the Federation of the 1967 editions of the Retail Clerks Union's magazine, *The Retail Clerks Advocate*, amply demonstrates, there are a host of additional devices which that union, seeking to communicate a far more limited message has utilized: a national consumer boycott involving "hundreds of picket demonstrations, tens of millions of leaflets, balloons and bumper stickers . . . to tell the story" (June, 1967, p. 3); announcements on a national television network "to advise customers of the benefits of shopping where they see the RCIA store card" (July, 1967, p. 18); state and county fairs, holiday celebrations and othen summer festivalse to provide "the opportunity to publicize the RCIA and the union store card" (October, 1967, p. 12); extensive distribution of RCIA shopping bags (June, 1967, p. 5 and October, 1967, p. 12); outdoor billboards in "strategic locations" (July, 1967, p. 14); sponsorship of local radio or television programs (October, 1967, p. 12, and April, 1967, p. 16); sponsorship of local sports teams (October, 1967, p. 28); union-industry show exhibits (July, 1967, p. 14); a "mile-long caravan" of automobiles to protest the Sunday selling of cars (January, 1967, p. 28); and even sky-writing, "a new idea in publicizing the 'shop union' theme" (November, 1967, p. 26).

tives and have been unsuccessful or that no effective alternatives exist, access is provided and guaranteed.[10]

By adopting such an approach, and avoiding reliance upon fictions and tests virtually impossible to apply rationally, this Court will adhere to its view, expressed in *Babcock & Wilcox*, that when dealing with competing rights, "accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other."

CONCLUSION

For the reasons stated herein as well as those urged by Petitioners, the Court is requested to reverse the court below.

Respectfully submitted,

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[10] Such a burden of proof upon those seeking to exercise First Amendment rights on another's private property was imposed in *NLRB* v. *Tamiment, Inc.*, 451 F.2d 794 (CA3, 1971).

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-492

MOTION FILED

MAR 8 1972

LLOYD CORPORATION, LTD.,
Petitioner,

v.

DONALD M. TANNER, ET AL.,
Respondents.

MOTION OF THE HOMART DEVELOPMENT CO. FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF OF THE HOMART DEVELOPMENT CO. AS AMICUS CURIAE

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

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tive was available for the effective expression of propaganda to the town's residents. In *Logan Valley* the union's publicity, having been directed to prospective customers of a specific store, could not reasonably effectively have been made other than at the store's location at a time when those customers could receive and be influenced by the union's message. Similarly, in both *Wolin* v. *Port of New York Authority*, 392 F.2d 83 (CA 2, 1968), and *In re Hoffman*, 64 Cal. 2d 845 (1967), the rights granted anti-war groups to picket the premises involved in those cases are consistent with the judgment that the object of the demonstrations,—*i.e.*, to reach and influence Vietnam-bound servicemen—could be effectively achieved only at the time and place where those servicemen were assembled.[5]

In accord with these decisions granting the right to propagandize on private property, those other courts which have refused to permit such conduct have done so in factual contexts in which there existed reasonably effective alternative means to the use of such private property. Thus, for example, in *Babcock & Wilcox Co.*, this Court emphasized both the existence of such reasonable alternatives and the consequent absence of necessity to use private property in order to achieve effective communication of the views sought to be expressed. And the application of this proposed rule to *Taggart* v. *Weinacker's*, 397 U.S.

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[5] Although the rule formulated here would, as applied to *Wolin* and *Hoffman*, yield consistent and national results, it remains true that they may be interpreted to differ from *Logan Valley* in that they involve not private centers designed to afford private commercial benefit but privately owned transport facilities designed to serve a public need otherwise served by the State. As such, they may perhaps legitimately be viewed as involving a "functional equivalent" to public property whereas the commercial activities at the Logan Valley Plaza could not appropriately result in the same description applied there. Property on which substitute municipal or State functions are performed may be viewed to be outside the reach of the rule of law proposed herein. Such an exclusion would not, of course, apply to *Central Hardware*, *Homart* or the instant case.

223, similarly justifies the state court's decision there, undisturbed by this Court, finding the union's picketing of private retail property to constitute a trespass rather than protected First Amendment activity; for in *Taggart* the union's use of private property was unnecessary since the availability of the adjoining *public* sidewalks gave the union a wholly effective alternative locus from which to reach the very persons with whom it sought to communicate from the private parking lot.

The fact that the rule proposed here explains and harmonizes the results reached in each of these cases while striking a reasonable balance between the conflicting Constitutional guarantees involved argues strongly for its express adoption by this Court in the instant case. A secondary benefit which would be derived from doing so consists of the fact that courts would then become free to decide cases without a forced reliance on legal fiction or on essentially post hoc rules.

When this Court in *Logan Valley* described shopping centers as "functional equivalents" of municipal property, its analogy referred only to the *private municipal* property involved in *Marsh* and was, therefore, saying only that in appropriate circumstances private property could be treated as if it were public. The Court made no fixed determination as to what those circumstances would be. What is clear, as was noted before, is that this Court did *not* conclude that whenever any private property is open to the public, it automatically and totally loses its character as "private" and becomes "public" for all purposes. In sum, reference to "functional equivalence" does not constitute an analytical tool for determining when private property is subject to public First Amendment use, but merely describes the conclusion, otherwise arrived at, that under particular factual circumstances it may be so used.

Similarly, the fact that the views sought to be expressed are "generally consonant" with the use to which the private property is put should not give rise to a rule

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On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

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MOTION OF HOMART DEVELOPMENT CO. TO FILE A BRIEF AS AMICUS CURIAE

Homart Development Co. ("Homart") hereby respectfully moves for leave to file a brief as *amicus curiae* in the instant case as provided for in Rule 42 of the Rules of this Court. Counsel for Petitioner has refused his consent.

Interest of Homart

Homart is the owner and operator of various shopping centers throughout the United States. It is also a party to two disputes closely related to the instant case: *Homart Development Co.* v. *Diamond*, No. 1469, *jt.pet.reh. den.*, March 6, 1972 (the Chief Justice and Mr. Justice Black-

mun being that the opinion should be granted), the direct predecessor of the decision below here[1] in which the California Supreme Court[2] enjoined Homart from barring "peaceful and orderly First Amendment activities" at one of its centers; and *Homart Development Co* v. *Fein* (R.I. Super. Ct. Aug. 6, 1971), *app. pend.*, No. 1174-A (R.I. Sup. Ct.), reprinted at pp. 16a-22a of the present petition for certiorari, in which another court refused to grant a similar injunction. Homart thus has a unique and vital interest in the outcome of the present controversy.[3] As a result of the denial of the joint petition for rehearing in No. 1469, this case will now be dispositive of Homart's rights.

Homart is concerned that this Court, in resolving the present dispute, should be aware of the critical additional considerations raised by the above litigation. It is Homart's view that the case for reversal here is greatly strengthened by an understanding of the range and complexity of the issues involved. The main burden of Homart's brief *amicus* is therefore devoted to an exploration of the present case as it relates to other, more typical, factual settings. The interest of the *amicus* is principally to alert the Court to other recurrent and important questions, critical to an appropriate resolution of this controversy, apart from those raised by the parties hereto.

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[1] On May 3, 1971, immediately following argument, the Ninth Circuit suspended the submission of the present case "pending the allowance or denial of the Petition for Certiorari in *Diamond* . . . and thereafter, if the Petition is allowed, until *Diamond* is decided . . ." Pet. for Cert., p. 7. Following receipt of notice that this Court had denied certiorari, the court rendered a *per curiam* opinion specifically relying upon the decision of the California Supreme Court in the *Homart* case. *Id.* at pp. 2a-3a.

[2] *Diamond* v. *Bland*, 3 Cal. 3d 653, 91 Cal. Rptr. 501, 477 P.2d 733 (1970).

[3] Homart participated as an *amicus curiae*, with the consent of all parties, in the present case when it was before the Ninth Circuit.

CONCLUSION

For the above reasons, Homart respectfully urges the Court to grant this motion for leave to file the accompanying *amicus* brief in the instant case in support of the position of the Petitioners.

Respectfully submitted,

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Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

---

BRIEF OF HOMART DEVELOPMENT CO. AS AMICUS CURIAE

This *amicus* brief is filed by Homart Development Co. ("Homart") contingent upon the Court's granting the foregoing motion for leave to file a brief as *amicus curiae.*

INTEREST OF THE AMICUS CURIAE

The interest of Homart is set out at pp. 1-2 of the foregoing motion for leave to file a brief as *amicus curiae.*

ARGUMENT

I.

Where, as here, there is a clash between constitutional rights, one right cannot myopically be preferred to the

other. A balance, as this Court recognized in *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956), must be struck. Neither the First nor the Fourteenth Amendments "have ever been treated as absolutes," *Breard* v. *Alexandria*, 341 U.S. 622, 642 (1950).

A critical component of this requisite accommodation is the particular forum involved. At one end of the spectrum is the home or other private non-commercial property; such premises are immune from all but the most compelling exercise of First Amendment activities. *Breard* v. *Alexandria*, *supra*; *cf. Martin* v. *Struthers*, 319 U.S. 141 (1942). At the other end of the continuum are "streets, sidewalks, parks and other similar public places [which] are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U.S. 308, 315 (1968). Similarly situated are such facilities as "privately held bridges, ferries, turnpikes and railroads," those "facilities built and operated primarily to benefit the public and . . . [to perform] essentially a public function." *Marsh* v. *Alabama*, 326 U.S. 501, 506 (1946). Such a functional equivalent of public property, even though privately owned, "may, at least for First Amendment purposes, be treated as though it were publicly held." *Logan Valley*, 391 U.S. at 316.[1]

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[1] It is for this reason that where the property involved is a large and important instrumentality of interstate commerce—as, for example, Los Angeles Union Station in *In re Hoffman*, 67 Cal. 2d 845 (1967) (described by the court as "like a public street or park", 67 Cal. 2d at 851) or the New York Port Authority Bus Terminal in *Wolin* v. *Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968) (described by the court as "closely resembl[ing] a public thoroughfare . . . a public instrumentality . . . [which,] with its many adjuncts, becomes something of a small city", 392 F.2d at 89)—the property rights of the private owner are, at least for First Amendment purposes, considerably circumscribed. A similar rationale also explains *Marsh*. There the private town of Chickasaw, with its pri-

The situs of the present dispute is of a totally different order. A shopping center, whether it be the highly unusual facility involved here, the typicial large regional shopping center of *Logan Valley* and of Homart in No. 1469, or the entirely different and traditional smaller "shopping center" of the *Taggart* v. *Weinacker's*, 397 U.S. 233 (1970) variety,[2] is not a public instrumentality. It is functionally and authoritatively a far different entity. The "owners of a shopping center do not have the same power and influence over the lives and thoughts of its customers as the owners of a company town have over its inhabitants. . . . [T]he power of the shopping center owner is not so far reaching and insidious as the power of the town . . ." Note, 49 Va.L.Rev. 1571, 1577 (1963).

Moreover, particularly where, as in No. 1469, the arena chosen is an enclosed interior mall, a far more compelling

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vately-owned "residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block'," clearly did not "function differently from any other town." 326 U.S. at 502, 508. While there may not have been actual dedication of such traditionally public facilities and passways to the public use, "the permissive use of the ways was considered equal to such dedication." *Breard*, 341 U.S. at 643. As Mr. Justice Frankfurter observed in his concurring opinion in *Marsh*, "the community aspects of a company town are decisive in adjusting the relations now before us, and more particularly in adjudicating the clash of freedoms which the Bill of Rights was designed to resolve . . ." 326 U.S. at 510-11.

[2] *Taggart* involved a single retail store containing a supermarket and a small drug department, all owned and operated by the same company. For the convenience of shoppers, the owner provided a small adjacent parking lot able to accommodate only two rows of automobiles. Adjoining the parking lot were public sidewalks. This type of "shopping center" and its counterparts continue to predominate the retail field. See, e.g., Applebaum, *Consumption and the Geography of Retail Distribution in the United States*, Michigan State University Business Topics, Summer 1967, at pp. 27-9, pointing out that, as of 1965, approximately 57% of "shopping center" business results from centers with a gross leaseable area of *less than* 200,000 square feet. Moreover, the vast percentage of additional retail business is accounted for by discount stores ("essentially a shopping center itself under one roof," *id.* at 31), solo "highway retailers" providing "easy access for automobile traffic and plenty of parking space" (*ibid.*) and single urban stores.

case for protection of the owner's property rights can be made in the case of a shopping center than in the instance of a public instrumentality or company town. The public frequents a shopping center, or any retail establishment, because of the substantial investment that has been made to gain and retain its patronage. The patrons have been led to believe, through the expenditure of considerable money and effort, that the establishment is a comfortable and convenient place to do business. They have a limited amount of shopping time available. If, upon entry, such prospective customers are enticed to devote their restricted purchasing time to a variety of controversial competing uses, there will clearly be a serious adverse effect on the store's normal sales activities. To now appropriate such private property for the unrelated activities of others is truly "to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country." *Logan Valley*, 391 U.S. at 333 (Black, J. dissenting).

II.

The nature of the desired use is also, of course, critical. There is, for example, a material difference between the constitutional protections afforded commercial and money-making activities and religous proseleticizing. See, e.g., *Breard* v. *Alexandria*, *supra*. There is also a significant difference where, as here, the objective is one which could have been achieved through numerous reasonable alternatives and at numerous other effective locations.[3] In such a case, where the party seeking to exercise

[3] For example, in the typical instance of No. 1469, the solicitation of signatures desired there could also have been engaged in on the abundant public sidewalks, public parks and other public facilities readily available in the area as well as at public affairs such as parades. Other potential arenas which admittedly were available included the exterior of local businesses, houses of worship, entertainment centers, sporting events and military installations. Communication with the public could also have been obtained through newspapers, radio and television, telephone, door-to-door contacts, bump-

free speech activities fails to show he has expended reasonable efforts to publicize his message through other channels of communication, there is no necessity to confiscate private property. See, e.g., *N.L.R.B.* v. *Babcock & Wilcox*, 351 U.S. 105, 112 (1961); *N.L.R.B.* v. *Kutcher's Hotel and Club*, 427 F.2d 200, 201 (2d Cir. 1971); *N.L.R.B.* v. *Tamiment, Inc.*, 451 F.2d 794 (3rd Cir. 1971); and *N.L.R.B.* v. *Solo Cup Company*, 422 F. 2d 1149 (7th Cir. 1970). In each of these cases there was, as in this case, no showing that other effective forums were not available. The prohibition of the desired access to private property did not, therefore, in contrast to *Logan Valley*, "substantially hinder the communication of . . . ideas" or create "a *cordon sanitaire* of parking lots." 391 U.S. at 324-5.

III.

The fact that some expression of communication may have otherwise been permitted at Lloyd Center is immaterial. Initially, there is surely a distinction between those activities which benefit the owner or his tenants by adding to "customer motivation" (App. to Pet. for Cert., pp. 3a, 8a) and other uses, such as that sought in this case, which would unavoidably disrupt and distract shoppers, and appropriate their limited purchasing time, with matters unrelated to center business. And even if some other non-commercial activities are tolerated, an all-or-nothing proposition is manifestly undesirable; the property owner's only choice would be either to sanction no such communication or otherwise waive the right to preclude the exercise of *any* free speech activities. To give one current illustration of the resultant dilemma: the March 7, 1972 edition of *The Washington*

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er stickers and mailings. In some instances these alternatives were too expensive or inconvenient; other alternatives were utilized effectively; in further cases arrangements were just being made to utilize such tactics; and, in still other cases, there was no attempt made to capitalize on such possibilities.

SUPREME COURT, U. S.

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IN THE

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LLOYD CORPORATION, LTD.,
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DONALD M. TANNER, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

OPPOSITION OF PETITIONER TO JOINT MOTION FOR LEAVE TO ENGAGE IN ORAL ARGUMENT

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OPPOSITION OF PETITIONER TO JOINT MOTION FOR LEAVE TO ENGAGE IN ORAL ARGUMENT

Pursuant to Rule 44(7) of the Rules of this Court, Homart Development Co. and Roger Jon Diamond, the petitioner and principal respondent, respectively, in *Homart Development Co.* v. *Diamond, et al.*, No. 1469, October Term, 1970, have filed a joint motion for leave to engage in oral argument in this case as *amici curiae.*

Petitioner opposes this motion for the following reasons:

1. The principal basis of the motion is the interest of movants in their own case, No. 1469, October Term, 1970. This Court is, of course, familiar with the interests and positions of movants, having considered and denied the petition for certiorari in their case, 402 U.S.

988 (1971), and two subsequent joint applications for rehearing of that denial (joint petition for rehearing denied October 12, 1971, 404 U.S. 874, and joint motion for leave to file second petition for rehearing denied March 6, 1972, 40 U.S.L.W. 3432).

2. In addition, movant Homart has submitted a motion for leave to file a brief *amicus curiae* and brief *amicus curiae* in this case, and movant Diamond states that he also intends to submit a similar motion and brief (motion, p. 1, n.1).

3. In view of these circumstances, Petitioner believes that oral argument by movants is neither necessary nor appropriate, particularly since it appears from their motion that they are interested in arguing the circumstances of their own case which this Court has thrice declined to hear. We also note that Rule 44(7) states that motions such as the instant one "are not favored."

For the reasons stated, the instant joint motion for leave to engage in oral argument should be denied.

Respectfully submitted,

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March 15, 1972

Post (p. 1, cols. 1-5) shows various candidates in the New Hampshire primary election campaigning, apparently with the owner's permission, inside factory premises. If one candidate is permitted such access, are other candidates, under the view suggested by the courts below, thereby required to be provided with "equal time?" And may the factory owner still bar other First Amendment activities as, for example, war protestors or religious handbillers or even union organizers? The fact that some communcation may have been previously permitted is thus clearly not a magical talisman which thereafter converts private property into public thoroughfares.

IV.

The result reached by the California Supreme Court in *Homart*, that a shopping center owner may protect his interests through "reasonable regulations," does not provide a workable solution. As both Homart and counsel for respondents will detail if permitted to orally argue this matter, there is patently no consensus as to the appropriate number, time, place, location, number of people or exhibits involved, manner of presentation and security factors that any such regulations would, *inter alia*, have to delineate. The provision for "reasonable regulations," accordingly, is merely a harbinger of litigation.[4] The proper resolution of this controversary, it is submitted, lies elsewhere: private property may be appropriated

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[4] For example, in *People* v. *Brayshaw*, No. A-332 (Riverside City, Cal. Sup. Ct.) (Nov. 30, 1971), a petition solicitor engaged in the same type of activity as in *Homart*, was convicted of criminal trespass for refusing to agree in advance to the "reasonable regulations" unilaterally imposed by a shopping center. The regulations required the solicitor, *inter alia*, to hold harmless the center, agree to remove any debris resulting from the solicitation and admit that the center had the right to withdraw the grant of solicitation privileges at any time it chose. The conviction was subsequently reversed on appeal on the expressed "narrow ground" that the latter portion of the rules "imposed an unreasonable regulation upon defendant."

for First Amendment activities only where it is shown in a particular instance that no reasonably effective alternative means of communication were available.

CONCLUSION

For the above-stated reasons, as well as those set forth by petitioner, the decision of the court below should be reversed.

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MOTION FOR LEAVE TO ENGAGE IN ORAL ARGUMENT

The American Retail Federation (hereinafter "Federation") hereby moves this Court pursuant to Rule 44(7) of the rules of this Court for leave to engage in oral argument of the instant case.[1] In support whereof, the following is respectfully shown.

The Federation is an organization composed of seventy-eight national and state retail associations. The membership of these associations consists of a wide variety

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[1] The Federation has filed a motion for leave to file a brief *amicus curiae* and brief *amicus curiae* herein.

of retail businesses ranging in size from small local stores to large national chains, representative of all aspects of the retail industry. Through these associations, the Federation represents approximately eight hundred thousand retailers with close to six million employees.

The question presented in the instant case—whether the owner of a private shopping center has a Constitutional obligation to make available such property for the use of those who desire to espouse any ideas thereon notwithstanding the availability of effective alternative locales to engage in such activities—is a matter of continuing importance to the Federation. Indeed, whatever resolution of this question is forthcoming from this Court, its impact upon the Federation's member associations, and the millions who are employed by the retailers which the Federation represents, will be dramatic.

By virtue of experience gained by the Federation through participating in numerous related cases before this Court,[1] and by its representation of hundreds of thousands of retail establishments of varying size and nature, the Federation is uniquely qualified to provide assistance to this Court, that is otherwise unavailable, in formulating a rule which will justly accommodate the manifold ramifications of the question presented.

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[1] The Federation, for example, has submitted briefs *amicus curiae* to this court in the related cases of *Amalgamated Food Employees Union, Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Taggart* v. *Weinacker's*, 397 U.S. 223 (1970); *Central Hardware Company* v. *N.L.R.B.*, No. 70-223; and *Homart Development Company* v. *Diamond, et al.*, No. 1469.

WHEREFORE, for the foregoing reasons, the American Retail Federation respectfully moves this Court for leave to engage in oral argument of the instant case.

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BRIEF FOR RESPONDENTS

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SUPREME COURT, U.S.
MOTION FILE
MAR 24 1972

In The

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-492

LLOYD CORPORATION, LTD.,
Petitioner,

v.

DONALD M. TANNER, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO ENGAGE IN ORAL ARGUMENT

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In the Supreme Court
of the United States

OCTOBER TERM, 1971

No. 71-492

LLOYD CORPORATION, LTD.
Petitioner,

v.

DONALD M. TANNER, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS

QUESTION PRESENTED

Whether the right of free expression guaranteed by the First and Fourteenth Amendments to the United States Constitution includes the right to distribute non-commercial handbills in a peaceful and orderly manner within the malls and walkways of Petitioner's shopping center which are functional equivalents of sidewalks of a public business district at times when they are open to general public access, particularly when Petitioner permits non-commercial expression there by other outside groups whose ideas and purposes are approved by Petitioner?

STATEMENT OF THE CASE

This case involves a large urban shopping center opened by Lloyd Corporation in Portland, Oregon in 1960. A. 44. Since both the privately-owned shopping center and the business district in which it is situated are referred to in the record as Lloyd Center, some clarification of terminology seems desirable.

The business district known as Lloyd Center is the area within the heavy black line on Pl. Ex. 3, A. 115.[1] It consists of all or part of 38 city blocks, plus public streets and sidewalks and a public park. Lloyd Corp.'s privately-owned shopping center known as Lloyd Center consists of substantially all of the business district, except the public streets, sidewalks and park, and occupies approximately 50 acres. A. 17, 57-58. Lloyd Corp. also owns a considerable amount of additional property adjacent to or near the Lloyd Center business district, as shown by Pl. Ex. 3, A. 115.

While the business district and Petitioner's shopping center in it are substantially identical, they are distinguished in this brief by use of the term "Lloyd Center" to mean the business district and by use of the term "shopping center" to refer to Petitioner's privately owned property within the business district.

The central portion of Petitioner's shopping center complex is a single multi-level structure situated on what was formerly 18 city blocks and the vacated

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[1] All exhibits of Respondents cited in this brief were offered and received in evidence at A. 36.

street area between them, bounded by N.E. Halsey St., N.E. 9th Ave., N.E. Multnomah St., and N.E. 15th Ave. Pl. Ex. 3, 4 and 5, A. 115-117. This portion was referred to by Respondents in the District Court as the "main" part of Petitioner's shopping center (A. 19-20, 56-57), and by the District Court in its opinion as the "Mall." Pet. App. 8a, 308 F. Supp. at 129. It occupies about 25 acres, houses the largest part of the shopping center and a majority of the 60 commercial tenants, and enjoys the greater part of the parking area and pedestrian traffic within the shopping center. Pet. App. 8a, 308 F. Supp. at 129; A. 18, 58, 64.

The single unified structure of this main part of the shopping center, as well as the unified portion of the shopping center north of it between Halsey and Broadway Sts., was made possible by the City of Portland vacating and conveying to Lloyd Corp. the public streets and sidewalks which formerly traversed it. See Pl. Ex. 3, 4 and 5, A. 115-117, and Pl. Ex. 27 (a colored diagram of vacated streets not reproduced in the Appendix). This was done on Lloyd Corp.'s petition by Ordinance No. 101288 of the Portland City Council in 1954, as amended by later ordinances. Pl. Ex. 25, 24, A. 214, 193, 197. The public street and sidewalk area thus conveyed to Lloyd Corp. was 385,000 square feet, or 8.838 acres. Pl. Ex. 25, 26, A. 217, 221. One of the conditions of the City's conveyance was a requirement that Lloyd Corp. dedicate within five years land of equal area in the vicinity of the shopping center for widening existing streets or

"for opening new streets for the purpose of providing proper access to the areas affected by these street vacations." Pl. Ex. 24, A. 193, 208.

Within the main part of the shopping center are numerous broad malls and walkways running from the central mall to covered and open interior parking areas and to exterior public sidewalks and streets. A. 17-18; Pl. Ex. 11 O-11 V, A. 136-139. The principal malls are 50 feet wide. A. 64. A skating rink is situated in the central mall, and an auditorium used for public meetings is on the lower level of the main shopping center structure. A. 18, 50. The malls and walkways within the shopping center are open to the general public at all times. A. 49.

People can reach Petitioner's shopping center by automobile, bus, or on foot. Those arriving by automobile enter and leave the vast parking areas of the shopping center by two-way lanes across the exterior public sidewalks. See Pl. Ex. 11A, -B, -D, -E, A. 129-131. Departing automobiles must stop before crossing the sidewalk from the parking areas, but arriving vehicles are not required to do so in entering them. The large interior parking areas were designed to permit people to reach the shopping center without walking across streets and without being exposed to the weather. A. 86. People arriving by bus or on foot enter the shopping center from the exterior public sidewalks, either by a radial mall or walkway leading to the interior of the shopping center, or by one of the few store entrances opening onto an exterior public sidewalk.

While Petitioner maintained and enforced a policy forbidding distribution of any handbills on the malls, walkways and other areas open to the general public within its shopping center, it permitted a variety of non-commercial activities by outside organizations in these areas. These included football rallies, Veterans' Day ceremonies, campaign speeches by presidential candidates in election years, displays by Boy Scouts and antique automobile groups, and choral and other musical performances. A. 53, 60-61, 179-180. In a letter urging presidential candidates to campaign at the Lloyd Center, Petitioner's public relations director stated that the shopping center staff had adequately handled a crowd of 20,000 at an Ella Fitzgerald concert in 1962. Pl. Ex. 20, A. 186-187.

Petitioner's auditorium in the shopping center was made available without charge to the Cancer Society, Campfire Girls and Girl Scouts, and upon a rental basis for meetings of political and other groups. A. 50. National television coverage of the 1964 Oregon presidential primary election originated from the auditorium. Pl. Ex. 20, A. 186.

Lloyd Corp. has permitted some charitable solicitations and distribution of materials on the interior malls and walkways of the shopping center, while prohibiting others. The permitted activities included sale of "Buddy Poppies" by the American Legion, and solicitation of funds by bell ringers of the Salvation Army and Volunteers of America. A. 52. Literature on Portland tourist attractions was distributed from

did not interfere with pedestrian traffic in the malls and walkways. A. 41-42, 74, 82, 93. No littering was observed. A. 47-48. The only reaction of passersby to the handbilling noted by Lloyd Corp. personnel was that of one lady who came up to Petitioner's shopping center manager Horn and asked him what was being distributed. After being advised by him of the tenor of the leaflets, she stated her disapproval of Respondents' views. A. 48. Respondent Tanner testified that one passerby told him to "drop dead," and another urged a policeman to stop bothering Tanner. A. 74-75.

The District Court found that Lloyd Corp. invites everyone to the shopping center and that the Mall is open to the general public. It further found that the interior parking facilities and walkways of the shopping center serve the same purpose as streets and sidewalks of a public business district, and that the Mall is the functional equivalent of a public business district. Pet. App. 10a, 308 F. Supp. at 130.

The District Court also rejected a contention that Respondents could distribute their handbills as effectively from the exterior public streets and sidewalks as from the interior walkways of the Mall:

> "It would be difficult and perhaps dangerous for Plaintiffs to distribute their handbills from the public sidewalks to customers entering the Mall. Many customers do not use the public sidewalks and streets except when entering the Mall by automobile. In addition, it would be much more difficult to reach pedestrians on the public sidewalks than to reach them in parts of the Mall interior

through which most customers pass. I find that Plaintiffs cannot distribute handbills as effectively from the public streets and sidewalks as they can from the Mall interior." (Pet. App. 11a, 308 F. Supp. at 131)

The District Court held that Respondents had a constitutional right to distribute the handbills in question in an orderly and peaceful manner to passersby in the walkways of Petitioner's shopping center. The Court further held that threats of arrest by Petitioner's security guards, in the exercise of their police authority, caused Respondents to discontinue their handbilling, and constituted action "under color of law," in violation of 42 USC § 1983. Pet. App. 12a-14a, 308 F. Supp. at 131-132.

The decision and Declaratory Judgment and Decree of the District Court were affirmed by the Court of Appeals. It held that the District Court's legal conclusion followed from its factual determination that Petitioner's shopping center was the functional equivalent of a public business district, and that the factual determination was supported by substantial evidence. Pet. App. 2a-3a, 446 F.2d 545.

SUMMARY OF ARGUMENT

The peaceful and orderly distribution by Respondents of their political leaflets on a municipal sidewalk could not constitutionally have been prohibited or subjected to prior restraint. Neither litter, nor the availability of other effective means or places for communi-

cation of Respondents' views, nor fear of controversy or hostile public reaction justify a prohibition on the exercise of free communication on public sidewalks of a business district.

Similar rights of free speech and press exist on portions of privately owned property which serve as functional equivalents of public sidewalks in a public business district. The Courts below found, on substantial evidence, that the interior malls of Lloyd Corp.'s shopping center are functional equivalents of the public sidewalks which existed until the City of Portland vacated and conveyed them to Lloyd Corp. for inclusion in its shopping center.

The rationale of the holdings of this Court in *Marsh* v. *Alabama*, 326 U.S. 501 (1946), and *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), followed by the Courts below in this case, is that to permit private owners of the functional equivalents of public sidewalks in the functional equivalent of a public business district to prohibit communication to the public on those walkways would be to frustrate the public's need for uncensored information. 326 U.S. at 508; 391 U.S. at 325-326; Pet. App. 14a, 308 Fed. Supp. at 132. The validity of this rationale is supported by the literature reporting current trends in the growth of private shopping centers in number and multiplicity of uses, to the point that many are the principal business districts of cities, if not cities in themselves. Lloyd Corp.'s development of its properties within Lloyd

Center and adjacent or near it has been an early example of these trends.

If First Amendment rights cannot be exercised on the functional equivalents of public streets and sidewalks within privately owned shopping centers, free speech and press will be restricted in direct proportion to the growth of such private business districts and their replacement of public business districts. This result was anticipated and forestalled by this Court's decision and reasoning in *Logan Valley*.

The argument of Lloyd Corp., and Amici Curiae urging reversal, that all handbilling "unrelated" to the business purposes of the shopping center property may be prohibited anywhere within the shopping center, should be rejected here, as it was below and in *Diamond* v. *Bland*, 3 Cal. 3rd 653, 477 P.2d 733 (1970), cert. den. 402 U.S. 988 (1971); *Sutherland* v. *Southcenter Shopping Center, Inc.*, 3 Wash. App. 833, 478 P.2d 792 (1971); and *State* v. *Miller*, 280 Minn. 566, 159 N.W.2d 895 (1968). The shopping center of Lloyd Corp. is a business and community hub which attracts a large number of people to a relatively small area. Neither the evidence nor Petitioner's Brief discloses any other place in Portland where Respondents' leaflets could have been distributed to comparable numbers of people in a similar period of time. Alternative means of communicating a political viewpoint, such as mass media advertisements, billboards and large scale mailings, are unavailable to those without financial means to afford them. Respondents could not communicate their political message to the

public as effectively by distribution of their leaflets elsewhere in Portland or by other means.

Substantial evidence supports the finding of the District Court that Respondents also could not distribute their leaflets to the public as effectively from the exterior public sidewalks around Lloyd Corp.'s shopping center. Distribution to the substantial number of persons entering and departing the shopping center parking lots by automobile would involve risks of safety and interference with automobile traffic.

Cases conditioning access of non-employees to the employer's business premises for union solicitations are distinguishable from shopping center cases, since they do not involve communication on private property open to the general public and serving as the functional equivalent of a public sidewalk in a business district.

Lloyd Corp.'s attempt to distinguish *Marsh* with the argument that its invitation to the public was limited to shoppers is contrary to the finding of the Courts below and the evidence.

Absolute prohibition of non-commercial handbilling in malls of a shopping center which are functional equivalents of public sidewalks in a business district would raise serious constitutional questions where, as in this case, public property has been conveyed to private ownership to permit the construction of a private business district displacing public streets and sidewalks, and public funds have been expended to reroute traffic around the shopping center and to im-

prove access to it. See *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Evans* v. *Newton*, 382 U.S. 296 (1966); *Marsh* v. *Alabama*, 326 U.S. at 507.

First Amendment guarantees may not extend to private property open to the general public in certain limited circumstances. This may be the case where all who enter a store or other business property may be as effectively reached by communication of the message on nearby public sidewalks, or where the physical conditions of private property are so limited that "unrelated" communication to the public there would disrupt or unreasonably interfere with the use of private walkway for business purposes. *Cf. Taggart* v. *Weinackers', Inc.*, 397 U.S. 223 (1970). These circumstances are not present in this case.

The rule of law proposed by the Amicus Brief (p. 9) of American Retail Federation is inadequate. The proper rule of law may be stated as:

> "Owners of private property open to the general public may not completely prohibit the exercise of non-commercial communication to the public on portions of the property which serve as functional equivalents of public sidewalks in a business district, except where substantially all members of the public who could receive the communication on the private property can also be reached with a similar expenditure of time and effort on the exterior public areas, or where the communication necessarily causes unreasonable interference with the use of the private property for business purposes."

If *Logan Valley's* concept of handbilling "generally consonant with the use to which the property is actually put" (391 U.S. at 319-320) is viewed as a criterion for prohibition, rather than regulation, such a criterion is met by the evidence of the non-commercial activities sponsored or permitted by Lloyd Corp. on the malls of its shopping center. Respondents' handbilling was no more distracting or controversial than some of the activities approved by Lloyd Corp., and involved far less interference with pedestrian traffic on the malls than such approved activities as football and political rallies.

Lloyd Corp. seeks a rule of law which will permit owners of shopping centers to insulate the public from views and expression which the owners disapprove or find "controversial," while communicating to the public their approval of certain other views and non-commercial community activities. If Lloyd Corp. and other shopping center owners obtain these rights of censorship, the effective exercise of free communication will diminish as shopping centers grow in number, size and multiplicity of activities, and replace public business districts.

Lloyd Corp.'s attempt to justify prohibition of all handbilling as "reasonable regulation" is specious.

To permit shopping center owners to prohibit peaceful and orderly communication to the public by distribution of handbills on the functional equivalents of public sidewalks of a business district would be a large step backward in the protection heretofore af-

forded by the First and Fourteenth Amendments to freedom of speech and press for all people.

Balancing the rights of Respondents and the public to free communication of uncensored viewpoints against Lloyd Corp.'s property rights, under the circumstances of this case, results in the same tilt of the scale in favor of free speech and press as in *Logan Valley* and *Marsh*.

ARGUMENT

A. The First and Fourteenth Amendment Guarantees of Free Speech and Press Include the Right to Distribute Political Handbills on Public Sidewalks, Subject Only to Reasonable Regulation to Avoid Undue Interference With the Ordinary Uses of Such Property.

The significance of the First Amendment guaranty of free communication through distribution of pamphlets and leaflets has been recognized by this Court on many occasions. *E.g., Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971); *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1938); *Martin* v. *City of Struthers*, 319 U.S. 141, 146-147 (1943).

If Respondents' leafletting had been done on a city sidewalk in the peaceful and orderly fashion shown by the evidence here, government could neither prohibit it nor impose prior restraints upon it. *Organization for a Better Austin* v. *Keefe*, supra; *Lovell* v. *Griffin*, supra. The fact that distribution may result in some littering does not justify prohibition of the constitutional right to exercise free speech and press.

Schneider v. *State*, 308 U.S. 147 (1939). See also *Wolin* v. *Port of New York Authority*, 392 F.2d 83, 92 (C.A. 2, 1968), cert. den. 393 U.S. 940.

Leafletting on public streets and sidewalks cannot be prohibited even if the exercise of this right could be carried out elsewhere. *Schneider* v. *State*, supra, 308 U.S. at 163:

> "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

Nor will fear of controversy justify absolute prohibition of political communication on appropriate public property. *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 508-509 (1969). See also *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269-271 (1964).

No one disputes that exercise of expression may be reasonably regulated in order to avoid undue interference with intended uses of the public or private property on which it takes place. See, *e.g.*, *Hague* v. *CIO*, 307 U.S. 496, 515-516 (1939). This case, however, does not involve any question of reasonable regulation, but an attempt by Lloyd Corp. to enforce a complete and absolute prohibition on any and all handbilling anywhere within its shopping center property.

B. The First and Fourteenth Amendment Guarantees of Free Speech and Press Extend to Non-Commercial Handbilling on Portions of Private Property Which Are Functional Equivalents of Public Sidewalks of a Public Business District; the Interior Pedestrian Malls of Lloyd Corp.'s Shopping Center Were Properly Found by the Courts Below to Be of That Character.

Similar rights of free speech and press exist on portions of privately-owned property which serve as functional equivalents of public streets and sidewalks in a public business district. In *Marsh* v. *Alabama*, 326 U.S. 501 (1946), members of the Jehovah's Witness sect were convicted of trespass for passing out leaflets on the sidewalk of the business district of a town wholly owned by a private corporation. This Court reversed the conviction.

> "Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. As we have heretofore stated, the town of Chickasaw does not function differently from any other town. The 'business block' serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees." (326 U.S. at 507-508)

Marsh was extended to shopping centers in *Amalgamated Food Employees Union* v. *Logan Valley*

an information booth in the central mall during the summer months, and pins promoting a local festival were sold there. A. 54. Presidential candidates were invited to distribute campaign material from a booth in the central mall. Pl. Ex. 20, 21, A. 187, 189.

Among the groups denied permission to use the interior malls and walkways of the shopping center for soliciting funds or other charitable purposes were the March of Dimes and Hadassah, a national Zionist women's service organization. Pet. App. 8a-9a, 308 F. Supp. at 129-130; A. 55. Permission for such use of the malls and walkways was granted or denied on the basis of whether Lloyd Corp. approved of the particular organization and its purposes and activities. A. 52, 56, 61.

Petitioner maintained a policy forbidding distribution of handbills on the malls and walkways within its shopping center. This policy was enforced by Petitioner's staff of uniformed security guards, who hold commissions from the City of Portland appointing them Special Police Officers "vested with full police authority." A. 19, 142-143; Pl. Ex. 6, 7, A. 118-119. The guards were instructed to treat persons who refused to cease handbilling as trespassers. A. 19; Pl. Ex. 8, 9, A. 120-125.

On November 14, 1968, a number of persons, including Respondents,[2] distributed leaflets to passersby

[2] The evidence is that approximately 5 persons were observed distributing the leaflets at Lloyd Center on this day. A. 73. Only 2 of them were observed anywhere near each other within the shopping center. A. 168.

at various points within the walkways of the Mall, the main part of the shopping center. A. 16. The distributors were associated with an informal group known as "The Resistance" or "The Resistance Community," whose common interest is opposition to the war in Vietnam.

The leaflets distributed by Respondents are Pl. Exs. 1 and 2, A. 111-114. They communicate both an invitation and a political message. The leaflets invited the public to a potluck dinner and meeting to be held that evening at a church,[3] characterizing it as a "Celebration of life," and a "communal feast and liturgy of liberation." The political statements affirmed opposition of The Resistance to the Selective Service System and to war in Vietnam and elsewhere.

Respondents and others distributing leaflets on the walkways within the shopping center were ordered by Petitioner's security guards to cease distribution there. A. 17. The guards threatened Respondents with arrest for trespass if they did not comply with these orders. A. 72-73, 77, 79, 81, 83. To avoid arrest, Respondents and others distributing leaflets within the shopping center moved to the exterior public sidewalks outside the shopping center to continue their distribution. A. 17, 74, 81, 84.

The distribution of the leaflets within the shopping center was at all times peaceful and orderly, and

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[3] Centenary Wilbur Methodist Church is located at 215 S. E. 9th Ave. P. Ex. 1, A. 112. This is 2 blocks south of Burnside St. and approximately 14 blocks south of the Multnomah St. side of Petitioner's shopping center. See maps, Pl. Ex. 3, A. 115, and Pl. Ex. 3A (not reproduced in Appendix).

Plaza, Inc., 391 U.S. 308 (1968). There, a Pennsylvania court, acting under a trespass statute, enjoined members of the plaintiff union from picketing anywhere within a privately-owned shopping center. Again, this Court reversed. The Court's description of the shopping center is comparable to Lloyd Corp.'s shopping center (391 U.S. at 310-311, 317-318). As here, the center was adjoined by public roads, had interior parking areas and sidewalks and was open to the general public. This Court found the shopping center similar to the business block which was the site of the leafletting in *Marsh* (391 U.S. at 317-318). It held the roadways and the sidewalks within the shopping center "functional equivalents of the streets and sidewalks of a normal municipal business district" (391 U.S. at 319), and the shopping center itself the "functional equivalent" of a business block in a municipality (391 U.S. at 325).

This Court held:

> "We see no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the 'business district' is not under the same ownership.
>
> . . . . .
>
> "All we decide here is that because the shopping center serves as the community business block 'and is freely accessible and open to the people in the area and those passing through,' *Marsh* v. *Ala-*

bama, 326 US at 508, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put." (391 U.S. at 319-320)

The District Court in this case found that Lloyd Corp.'s shopping center is the functional equivalent of a public business district and that its interior malls are functionally equivalent to sidewalks of a public business district:

> "In 1954, when the Corporation acquired land for the Center, the City of Portland vacated about eight acres of public streets for use by the Corporation. The ordinance by which the City vacated the streets recited that the City intended that the Corporation should use the land for the construction of 'a general retail business district.' In spite of this ordinance, the Corporation now asserts that the Mall is like an office building rather than like a public business district. Although the Mall's multilevel design is not yet common among modern shopping centers, the Mall is a prototype for future city planning. Its parking facilities and sidewalks serve the same purpose as streets and sidewalks of a public business district. I find that the Mall is the functional equivalent of a public business district." (Pet. App. 10a; 308 F. Supp. at 130)

As the Court of Appeals held (Pet. App. 2a; 446 Fed. 2d 545), these findings are supported by substantial evidence. Indeed, the record shows that for-

mer public street and sidewalk areas have been vacated, incorporated into a privately-owned, enclosed business district, and replaced by pedestrian malls within the shopping center. See map, Pl. Ex. 3, A. 115, and diagram of vacated public street areas, Pl. Ex. 27. These findings do not appear to be challenged in this Court by the briefs of Lloyd Corp. or of Amici Curiae.

C. The Public Need for Uncensored Information Would Be Frustrated If Private Owners of the Functional Equivalents of Public Sidewalks in a Business District Could Prohibit Communication to the Public on Those Walkways; the Validity of This Underlying Reasoning of the Marsh and Logan Valley Decisions Is Confirmed by Current Trends in the Growth and Development of Private Shopping Centers, Which Will Correspondingly Restrict Exercise of Free Speech and Press If These Rights Cannot Be Exercised on the Functional Equivalents of Public Streets and Sidewalks Within Them.

The rationale of both *Marsh* and *Logan Valley*, as well as of the District Court's decision in this case, is that to permit private owners of the functional equivalents of public sidewalks in the functional equivalent of a public business district to prohibit communication to the public on those walkways would be to frustrate the public's need for uncensored information. 326 U.S. at 508; 391 U.S. at 325-326; Pet. App. 14a, 308 Fed. Supp. at 132. This Court in *Logan Valley* recognized that such limitations on free expression in the context of the growth of large, modern shopping centers could stifle free expression by creating a "cordon sanitaire" around privately-owned business

districts, and thus limit free speech and press only to public business districts. 391 U.S. at 324-325. Without the "functional equivalent" doctrine of *Marsh* and *Logan Valley*, freedom of communication would be restricted in direct proportion to the continued growth of private shopping centers.

> In this context, this Court noted in *Logan Valley:* "The economic development of the United States in the last 20 years reinforces our opinion of the correctness of the approach taken in *March*. The large-scale movement of this country's population from the cities to the suburbs has been accompanied by the advent of the suburban shopping center, typically a cluster of individual retail units on a single large privately-owned tract. It has been estimated that by the end of 1966 there were between 10,000 and 11,000 shopping centers in the United States and Canada, accounting for approximately 37% of the total retail sales in those two countries." (391 U.S. at 324)

The growth of private shopping centers has continued apace since the 1966 figures quoted in *Logan Valley*. A recent article estimates the present number of shopping center complexes in the United States alone at 13,000, made up of 200,000 retail units accounting for 40% of all retail sales other than automobiles and building materials.[4] The same article

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[4] Chain Store Age, February, 1971, p. 25. The "yellow pages" of the current Portland, Oregon telephone directory list 14 shopping centers in the Portland metropolitan area.

Another article reports that 61% of Montgomery Ward & Co.'s sales and 73% of its pre-tax profits in 1969 came from its 82 outlets in shopping centers, and that the company plans

(Footnote 4 Continued on Page 22)

predicts construction of another 800 to 1,000 shopping centers in 1971, and a similar number in 1972. Another article estimates that there will be 25,000 shopping center complexes in the United States by 1985.[5]

Recent articles point out two other trends in the private shopping center phenomenon. The first is the construction of more shopping centers in downtown urban areas of cities, a trend in which Lloyd Corp.'s development in Portland is an early example. The second is the planning of shopping center complexes as part of much more comprehensive private developments approximating cities, with retail shopping areas including or surrounded by office buildings, apartments and houses. Both of these trends are discussed in "Shopping Centers Grow Into Shopping Cities," Business Week, September 4, 1971, p. 34-38:

> "No longer are shopping centers simply the small retail hubs they used to be: one or two department stores and a handful of shops and restaurants. Now, more and more, they are becoming miniature downtowns with three, four, and five department stores, scores of smaller stores and services, plus hotels, apartment houses, office buildings, cultural centers, churches, and theaters.
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> . . . . .
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> "Along the way, shopping centers are developing the same kind of ambience and personality that

to open another 125 stores in shopping centers in the next 10 years. Sales Management, November 1, 1970, p. 34-36.

[5] Publishers Weekly, February 1, 1971, p. 54-55, February 8, 1971, p. 70-71.

> was previously found only in downtown business districts. In fact, many developers are taking their centers into downtown districts and trying to revitalize some of the very core areas that are hit hardest by competition from suburban centers.
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> . . . . .
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> "The key word is not so much 'giantism,' stresses President James W. Rouse of Rouse Co., one of today's leading developers. 'It is comprehensiveness. It is completeness—the integration of all the retail and commercial functions of modern life and the activities that people are involved in.'"

The same article refers to modern shopping centers as a "social gathering place," "communities within themselves" and "cities developing within cities."

Similar trends are reported in an article in Sales Management, November 1, 1970, p. 34:

> "New shopping centers will become more integral parts of their surrounding urban infrastructure. Some of the larger centers are already adding office parks to draw in light industry. Future centers may be focal points for new 'satellite cities' in metro areas. A case in point: the Northlake and Cumberland planned community projects by Crow, Pope & Carter (CP&C) in Atlanta. The projects will have two-level shopping centers surrounded by a mixture of apartments and townhouses, office parks, and community halls. Already such companies as Sears, J. C. Penney, and Gulf Oil Corp. have signed contracts. The idea, says CP&C marketing director Mark Van Brooks, will spread because 'people want to work and shop close to where they live rather than fight traffic congestion.'

"Shopping centers will be under increasing pressure to serve more than the family's consumption needs, especially those urban functions that fall in the cultural, educational and recreational areas. 'Shopping has become a family experience,' warns Bruce B. Dayton, president of Dayton Hudson Corp., 'and family shoppers are expecting more in all aspects of their lives; they want to be involved together in a variety of areas that interest them. Our center should be responsive to these expectations.' "[6]

Lloyd Corp.'s development of the downtown Portland area in the vicinity of Lloyd Center appears to be following these trends. The shopping center at its

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[6] See also Chain Store Age, September, 1971, p. 4:
"Eventually, the developers of these projects see the shopping center core as becoming a true 'downtown' area much like the downtown areas of many major cities, a focal point for everything that goes on in the communities surrounding it.

. . . .

"Non-retail developments such as banks and other services are already a part of many shopping centers, notes Rouse executive Ned Daniels. 'We have developed a number of office buildings in connection with our shopping malls, and we've also brought in such things as a library, a store-front church and theaters.' Rouse design director Ted Baker thinks the combination of shopping center core and planned community is really heading toward becoming a mini-city. 'In planning these projects,' Baker says, 'these additional non-retail facilities will become part of the project economics right from the beginning, as opposed to being developed as afterthoughts involving separate real estate transactions.' "

See also *Cottonwood Mall Shopping Center, Inc.* v. *Utah Power & Light Co.*, 440 F.2d 36 (C.A. 10, 1971), cert. den. — U.S. —, 40 U.S. L. Week 3165 (1971):
"Thus, to the great delight of promoters, enterpreneurs, mortgage lenders, building contractors and merchants, the modern shopping center is a part of the community. It seeks to seek and serve the public. And the law at appropriate times recognizes its public characteristics, whatever may be the nature of legal title." (440 F.2d at p. 42)

opening in 1960 was described in a newspaper article as a "city within a city."[7] Another article two years later, entitled "Lloyd Center Now 'Way of Life' for Local Folks," characterized Lloyd Center as a "tourist attraction," and continued:

> "In community activity, too, Lloyd Center has become firmly entrenched in the space of two years as a second hub of Portland. Furthering its established reputation in this respect, the center's management is considerably enlarging its planned program offering auto shows, symphony concerts, political meetings and dramas, to name but a few of the multitude of activities gracing Lloyd Center's open-air display spaces and enclosed auditorium."[8]

Still later articles, based on interviews with Lloyd Corp. personnel, report that the Corporation now owns some 130 city blocks, consisting of its properties within Lloyd Center, plus other adjacent and nearby lands occupied by the Sheraton Hotel, two other hotels, four office buildings, a high-rise Presbyterian retirement home and other businesses, and that the Corporation is developing the 130-block area in accordance with its master plan.[9]

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[7] *Oregon Journal*, July 22, 1960, Sec. 4, p. 1, col. 1.

[8] *Oregon Journal*, August 1, 1962, LC sec., p. 24, col. 2.

[9] *Oregon Journal*, July 28, 1971, p. 24, col. 1; *Oregonian*, November 10, 1970, p. 1, col. 2. See also the testimony of Lloyd Corp. President Von Hagen, A. 88-89.

Lloyd Corp.'s purchase of the 4.77-acre Holladay School site, adjoining the shopping center on the east (Pl. Ex. 3, A. 115), from the local school district was announced in the latter article. Plans for construction of a three-deck parking structure on this tract were subsequently announced by the Corporation's President Von Hagen. *Oregonian*, 5/23/71, p. 1, col. 3.

(Footnote 9 Continued on Page 26)

Thus, the comparison in *Logan Valley* (391 U.S. at 317-319) of modern shopping centers to the business district of a company town in *Marsh* and to "a normal municipal business district" becomes even more accurate with time. The attempt of Petitioner and Amici Curiae to distinguish *Marsh* from this case, upon the ground that *Marsh* involved prohibition of free expression in an entire town, appears clearly untenable in the light of reality. Many privately-owned shopping centers are becoming something closely approximating cities or the "downtown" business districts of cities, if, indeed, some of them cannot already be accurately so described.

Moreover, the growth of privately-owned business districts in and around shopping centers emphasizes the accuracy of the apprehension in *Logan Valley* (391 U.S. at 324-325) that free speech will be restricted as such complexes replace public business districts, if First Amendment rights cannot be exercised on the functional equivalents of public streets and sidewalks within private property open to the general public.

Some of the Corporation's additional development outside Lloyd Center has involved more vacation of public streets in order to permit "super blocks." See *Oregonian*, 1/21/68, p. 1, col. 8; *Oregon Journal*, 8/6/65, sec. 3, p. 5, col. 4.

D. The Fact That "Unrelated" Political Expression May Be Communicated to the Public Elsewhere Cannot Justify Complete Prohibition of it on Pedestrian Malls of a Privately-Owned Shopping Center Which Are the Functional Equivalents of Public Sidewalks of a Business District, at Least in the Absence of a Showing That Distribution of Respondents' Leaflets Elsewhere Would Reach the Large Numbers of People Attending Lloyd Corp.'s Shopping Center in a Similar Period of Time.

Petitioner attempts to distinguish and limit *Logan Valley* with the argument that political expression "unrelated" to the intended uses of the shopping center property by Lloyd Corp. and its tenants need not be permitted within the shopping center, since Respondents could distribute their leaflets on exterior public sidewalks around the shopping center and elsewhere in Portland.

As we have noted, the argument that leaflets could be distributed to the public elsewhere cannot justify prohibition of the exercise of First Amendment expression on public sidewalks. *Schneider* v. *State*, supra, 308 U.S. at 163. We submit that it also cannot justify complete prohibition of political expression on malls and walkways within private shopping centers which are functional equivalents of public sidewalks. Carefully reasoned authority so holds. *Diamond* v. *Bland*, 3 Cal. 3rd 653, 477 P.2d 733 (1970), cert. den. 402 U.S. 988 (1971); *Sutherland* v. *Southcenter Shopping Center, Inc.*, 3 Wash. App. 833, 478 P.2d 792 (1971). See also *State* v. *Miller*, 280 Minn. 566, 159 N.W.2d 895 (1968).

At the very least, the ability to communicate elsewhere a political message to the public is immaterial, if the owner of the private shopping center property which is the functional equivalent of a public sidewalk cannot show that communication of the message elsewhere would reach the large numbers of people attending the shopping center in a similar period of time.

The malls and sidewalks of a large shopping center are often the most effective and appropriate place for distributing a message to the general public for precisely the same reasons that Lloyd Corp. sponsors non-commercial activities there: large numbers of people are attracted to shopping centers that are frequently the business and community hubs of a metropolitan area. To say that Respondents could distribute leaflets elsewhere in Portland, but not within Lloyd Corp.'s shopping center, would be to deny Respondents access to a place where Respondents' message could be communicated to the largest number of people in the shortest period of time.

Neither the evidence nor the brief of Lloyd Corp. discloses any other place in Portland where Respondents' leaflets could have been distributed to comparable numbers of people in a similar period of time. Nor is there any showing that Respondents' distribution of leaflets elsewhere would have reached those persons who shopped only at Lloyd Corp.'s shopping center. The multiplicity of conveniently grouped stores in a private shopping center is, of course, intended to encourage "one-stop" shopping for a wide variety

of goods and services. Obviously, many of the people to be found on the malls and walkways of Lloyd Corp.'s shopping center on November 14, 1968 would not be found on the public sidewalks of any other business district in the Portland area at that time.

As the California Supreme Court stated in *Diamond* v. *Bland:*

> "Plaintiffs in the instant case cannot claim that effective alternative sites for their First Amendment activities are unavailable. If plaintiffs are barred from circulating their initiative petitions in the Inland Center, they are free to do so on the public streets and sidewalks in the surrounding community. Nevertheless, it is clear that they have a substantial interest in being able to solicit signatures and distribute information at the Center. Access to the thousands of persons who congregate on foot daily at the Center is a highly significant vehicle for the dissemination of ideas, particularly when the activity requires time for discussion and a place for obtaining signatures. The Inland Center serves as the primary business district for a large surrounding community and is the most effective and desirable location for the conduct of plaintiffs' First Amendment activities." (3 Cal. 3rd at 662; 447 P.2d at 738)

Persons seeking signatures on petitions in the *Sutherland* and *Miller* cases went to shopping centers for the same reason.[10] The leaflets in *Organization for*

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[10] In letters urging the 1964 presidential candidates to campaign at the shopping center, Lloyd Corp. cited among the advantages of its shopping center facility for this purpose:

"3. A built-in audience in a concentrated area. Thousands of people would be able to see and hear the . . . candidate."

(Footnote 10 Continued on Page 30)

available for communication of the message may be appropriate in many of the union solicitation cases which have so conditioned access of non-employees to an employer's business premises. Those cases do not involve private property which is open to the general public and which serves as the functional equivalent of public sidewalks. Industrial plants, as in *NLRB* v. *Babcock and Wilcox Co.*, 351 U.S. 105 (1956), are not generally open to the public at large. Nor are country clubs and resorts when they are surrounded by fences and accessible only through guarded gates, or otherwise restricted to prevent general public access. See *NLRB* v. *Tamiment, Inc.*, 451 F.2d 794 (C.A. 3, 1971); *NLRB* v. *S & H Grossinger's, Inc.*, 372 F.2d 26 (C.A. 2, 1967).

No such condition on free expression is appropriate, however, on portions of private property to which the general public is invited and has free access and which serve as functional equivalents of sidewalks of a public business district. *Central Hardware Co.* v. *NLRB*, — F.2d —, 76 LRRM 2873, 2877 (C.A. 8, 1971), cert. granted 40 U.S. L. Wk. 3314, No. 70-223 (1972).

Petitioner in its Brief (p. 18-19) attempts to distinguish *Marsh* with the argument that Lloyd Corp.'s invitation to the public was limited: "to shop while the Center is open" and to come upon its property "for shopping purposes." The findings of the District Court and the evidence rebut any such limitation on the extent to which Lloyd Corp. has opened its shopping center property to the public. As the District

Court found, "The Corporation invites everyone to the Center and permits anyone to enter the Mall," and "the Mall is open to the general public." Pet. App. 10a, 308 Fed. Supp. at 130. Many non-commercial activities on the malls of the shopping center and in its auditorium are invited or promoted by the Lloyd Corp. because they bring large numbers of people to the shopping center. A. 51. Obviously, Petitioner hopes that more people at the shopping center will mean more potential customers for its merchant tenants. Its invitation to the public, however, is clearly not limited to customers of its tenants.

Prohibition of free expression on areas within private property which are functional equivalents of public sidewalks of a business district would raise serious constitutional questions when, as in this case, public property has been conveyed to private ownership to permit the construction of a private business district displacing public streets and sidewalks, and additional public expenditures are necessary to re-route traffic around the shopping center and to improve access to it.[12] See *Burton* v. *Wilmington Parking Authority*,

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[12] Public streets were vacated and conveyed by the City of Portland to Lloyd Corp. to permit the construction of a "general retail business district." Pl. Ex. 24, A. 193, 202. The ordinance recited that such vacations "will be of material financial benefit to Lloyd Corporation" and that "it is contemplated in the future that additional street area will have to be opened in order to adequately take care of traffic congestion and ingress and egress to the Banfield Expressway when constructed." A. 202. The ordinance also provided that the equal area to be conveyed to the city by Lloyd Corp. was to be used for widening existing streets or "for opening new streets for the purpose of providing proper access to the areas affected by these street vacations," which was the Lloyd Center area. A. 208, 202.

(Footnote 12 Continued on Page 34)

365 U.S. 715 (1961); *Evans* v. *Newton*, 382 U.S. 296 (1966). See also *Marsh*, 326 U.S. at 507:

> "We do not think it makes any significant constitutional difference as to the relationship between the rights of the owner and those of the public that here the State, instead of permitting the corporation to operate a highway, permitted it to use its property as a town, operate a 'business block' in the town and a street and sidewalk on that business block."

It is doubtful, to say the least, that government can constitutionally convey public property and spend public funds to promote the creation of a private business district, with interior pedestrian malls which literally replace and serve the function of the former public sidewalks, if the private owner may thereafter prohibit the free expression which was previously available on the former public sidewalks.[13]

A newspaper article at the time the shopping center opened in 1960 reported that the city council was changing traffic on 4.5 miles of public streets in and near Lloyd Center from a two-way system to a one-way grid, and that the city was installing new signals at 15 intersections, erecting over 2,000 new traffic signs, and making curb cuts to facilitate traffic flow at 20 intersections. *Oregonian*, July 7, 1960, p. 1, col. 1.

[13] See *Smith* v. *Holiday Inns of America, Inc.*, 336 F.2d 630 (C.A. 6, 1964), involving racial discrimination by a motel situated on land purchased from and subject to supervision by a city re-development authority; *DDB Realty Corp.* v. *Merrill*, 232 Fed. Supp. 629 (D. Vt. 1964), involving the restriction of ski privileges to members of a corporation leasing property from a state; *Sams* v. *Ohio Valley General Hospital Ass'n.*, 257 Fed. Supp. 369 (ND W. Va., 1966), involving discrimination against doctors by a private hospital receiving federal funds through state allocation; *Kissinger* v. *New York City Transit Authority*, 274 Fed. Supp. 438 (SDNY 1967),

(Footnote 13 Continued on Page 35)

It may be that First Amendment guarantees do not extend to private property open to and used by the general public in certain peculiar and limited circumstances. Where all who enter a store or other particular private property may be as effectively reached by communication of the message on nearby public sidewalks, there is no need for exercise of the expression on private property. This may calm the fears expressed in the amicus brief of American Retail Federation for small individual enterprises. Similarly, when physical conditions of private property are so limited that exercise of free expression there would necessarily disrupt or unreasonably interfere with the use of a private walkway for business purposes, free expression there may weigh less heavily in the balance with property rights. *Cf. Taggart* v. *Weinackers', Inc.*, 397 U.S. 223 (1970).

Neither of these circumstances is present in this case. We have already cited the evidence that those arriving at the Lloyd Corp.'s shopping center by automobile and parking in its interior parking lots cannot be effectively reached by distribution of leaflets on exterior public sidewalks. Similarly, distribution of leaflets by Respondents here involved no interference with pedestrian use of the malls within the shopping center. The principal malls are 50 feet wide, and easily accommodate large crowds of people. A. 64; photographs, Pl. Exs. 11-O through 11-V, A. 136-139.

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involving "controversial" advertising refused by a private agency holding a contract from a public body to place all advertising on city subways.

A group of 5 scattered distributors of the leaflets in question here obviously presented no potential for unreasonable interference with pedestrian traffic on malls which have accommodated thousands for football rallies, presidential campaign speeches and other activities. A. 53, 60-61; Pl. Ex. 20, A. 186-187.

The rule of law proposed by the amicus brief (p. 9) of American Retail Federation does not give proper weight to the realities of modern shopping centers which serve as the functional equivalents of public business districts, to the high priority of free political expression recognized by the decisions of this Court, or to the public interest and investment in the creation of such shopping centers. The rule of law supported by *Marsh*, *Logan Valley* and other cases, harmonizing with both the great social significance of free expression and the realities of modern shopping center development, is:

> Owners of private property open to the general public may not completely prohibit the exercise of non-commercial communication to the public on portions of the property which serve as functional equivalents of public sidewalks in a business district, except where substantially all members of the public who could receive the communication on the private property can also be reached with a similar expenditure of time and effort on the exterior public areas, or where the communication necessarily causes unreasonable interference with the use of the private property for business purposes.[14]

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[14] While this case does not involve such property, it may

(Footnote 14 Continued on Page 37)

Even if *Logan Valley's* concept of handbilling "generally consonant with the use to which the property is actually put" (391 U.S. at 319-320) is viewed as a criterion for prohibition, rather than regulation, the facts in the present case clearly meet such a criterion. Respondents' distribution of leaflets in a peaceful and orderly manner to passersby on the malls of the shopping center is not significantly unlike other non-commercial activities there by outside groups which Lloyd Corp. has sponsored or permitted. E.g., campaign speeches and distribution of political literature by presidential candidates (A. 51, 60-61, Pl. Ex. 20, A. 186-187), Veteran's Day ceremonies by veterans' organizations (A. 53) and solicitations of funds from the public by the Salvation Army and Volunteers of America (A. 52). See *Wolin* v. *Port of New York Authority*, 392 F.2d 83 (C.A. 2, 1968), cert. den. 393 U.S. 940:

> "The Terminal building is an appropriate place for expressing one's views precisely because the primary activity for which it is designed is attended with noisy crowds and vehicles, some unrest and less than perfect order. Like a covered marketplace area, the congestion justifies rules regulating other forms of activity, but it seems undeniable that the place should be available for use in appropriate ways as a public forum. The admission of charity solicitors, glee clubs and automobile exhibitions without untoward incident evidences the ease with which the Terminal ac-

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be well to observe that private residences, hotel, apartment and office building lobbies, and store interiors, like the hallways of courthouses, are not functional equivalents of public sidewalks in a public business district.

commodates different forms of communication. To deny access to political communication seems an anomalous inversion of our fundamental values." (392 F.2d at 89-90)

The only difference in Respondents' expression from some Lloyd Corp. has permitted is the fear of the Corporation that distribution of a handbill opposing Selective Service and the war in Southeast Asia may be "controversial" and distracting to customer motivation to buy. As to distraction, what of the crowd attracted by football rallies, or the crowd of 20,000 who came to hear an Ella Fitzgerald concert Pl. Ex. 20, A. 186-187? As to the "controversial" message of the leaflets, what of a presidential campaign speech, or Salvation Army solicitation as seen by some members of other religious groups, or a display of National Guard weaponry?[15] In any event, the record shows no significant public reaction to Respondents' leafletting. A. 48, 74-75.

A reading of Petitioner's Brief, as well as the testimony of its shopping center manager and the president of the Corporation (A. 48-56, 71, 89-94), makes it clear that Lloyd Corp. seeks a rule of law which will permit owners of shopping centers to insulate the public from views and expression which the owners dis-

[15] A news article based on an interview with Petitioner's shopping center manager Horn summarizes a "wide variety of activities and exhibits put on by the center" in 1964, including a display of National Guard weapons and equipment upon the malls, which was characterized as turning the shopping center into "Camp Lloyd" for a day. *Oregonian*, January 10, 1965, LC sec., p. 2, col. 1.

approve or find "controversial," while remaining free to communicate to the public their approval of certain other views and non-commercial community activities. Lloyd Corp. approves and permits solicitation of funds from the public by the Salvation Army, but denies such permission to Hadassah. A. 52, 55-56. It permits use of its auditorium by Camp Fire Girls, Girl Scouts and the Cancer Society without charge, but requires other groups to pay a rental for its use. A. 50. It permits political speeches and distribution of campaign literature by presidential candidates, but not by candidates for other political offices.[16] A. 51, 60-61. Veterans' Day ceremonies on the malls by veterans organizations and sale of "Buddy Poppies" by the American Legion are permitted, but a leaflet opposing war in Southeast Asia and the Selective Service System may not be distributed. A. 52. Music over the shopping center public address system will be confined to the "light and carefree," and sculpture on the malls must be "humorous, abstract, and non-controversial in implication." D. Ex. 60, A. 254.

In short, Lloyd Corp. and other shopping center developers seek to create private business districts, and even "mini-cities," often with governmental assistance in the form of zone changes, vacation of public streets and re-routing of traffic patterns, but to maintain the absolute right to determine what ex-

[16] A resolution of the Lloyd Center Merchants Association, whose members consist of shopping center tenants, opposes "political campaigning (except by special invitation of the Center)." D. Ex. 59, A. 252.

pression may be communicated to the public on the functional equivalents of public sidewalks within the shopping centers. If Lloyd Corp. and other shopping center owners obtain these rights of censorship, the effective exercise of free communication will diminish as shopping centers grow in number and in size and replace public business districts. Moreover, the legal rule sought by Lloyd Corp. would undoubtedly further increase the competitive advantages of shopping center tenants over businesses located in public business districts by increasing the contrast between decaying, hurly-burly public business districts and bright, new and enclosed private business districts occupied by shopping centers.[17]

E. Complete Prohibition of All Handbilling on the Pedestrian Malls of Lloyd Corp.'s Shopping Center Cannot Be Justified as "Reasonable Regulation."

The attempt of Lloyd Corp. in its brief (p. 25-27) to justify its complete prohibition of all handbilling on the malls of the shopping center as "reasonable regulation" of this form of communication is clearly

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[17] The article on the growth of shopping centers in Business Week, September 4, 1971, p. 34, displays side-by-side photographs of shoppers in the spacious interior mall of a San Jose, California shopping center and of a contrasting "pedestrian-jammed downtown Chicago" sidewalk in a public business district.

The principal competitive advantage of a retail store located in a private shopping center, however, may be the "controlled competition" resulting from the owner's selection of tenants and the opposition of many shopping centers to location of "discount" stores within their boundaries. See discussion of this point in the same Business Week article, and in Publisher's Weekly, February 1, 1971, p. 54.

a mere play on words. *Logan Valley* speaks of regulation to prevent undue interference with the ordinary uses of the property. 391 U.S. at 320-321. Such regulation might be directed to the time, place and manner of the communication to the public, and would certainly strike a balance between the need for effective communication to the public and preservation of the ordinary uses of the property. See, *e.g.*, *Wolin* v. *Port of New York Authority*, supra, 392 F.2d 83 at 93-94; *Diamond* v. *Bland*, supra, 3 Cal. 3rd at 665, 477 P.2d at 741; *Jones* v. *Board of Regents*, 436 F.2d 618, 621 (C.A. 9, 1970). As these cases indicate, complete prohibition of communication with the public by handbilling or other orderly means cannot be justified as "regulation."[18]

In summary, the balancing of Respondents' First Amendment rights of freedom to communicate their message to the public against Lloyd Corp.'s property rights, under the circumstances shown by the evidence in this case, results in the same tilt of the scale as in *Logan Valley* and *Marsh*. As this Court observed in *Logan Valley*, 391 U.S. at 324:

> "The sole justification offered for the substantial interference with the effectiveness of petitioners' exercise of their First Amendment rights to promulgate their views through handbilling and picketing is respondents' claimed absolute right under

[18] For representative samples of this Court's decisions in distinguishing between regulation and prohibition of speech and press on public property, see *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Cox* v. *New Hampshire*, 312 U.S. 569 (1941); and *Hague* v. *CIO*, 307 U.S. 496 (1939).

a Better Austin v. *Keefe*, 402 U.S. 415, were distributed for several days at a shopping center. A suggestion in the amicus brief (p. 15) of American Retail Federation that Respondents could use other means of communication to the public, such as advertisements in the mass media, billboards, and large scale mailings, is obviously unresponsive to expression by those without financial means. As this Court noted in *Martin* v. *City of Struthers*, 319 U.S. at 146, distribution of leaflets "is essential to the poorly financed causes of little people."

As to Lloyd Corp.'s argument that Respondents could distribute their leaflets to the public as effectively from exterior public sidewalks around its shopping center, the finding of the District Court is to the contrary:

> "It would be difficult and perhaps dangerous for Plaintiffs to distribute their handbills from the public sidewalks to customers entering the Mall. Many customers do not use the public sidewalks and streets except when entering the Mall by automobile. In addition, it would be much more difficult to reach pedestrians on the public sidewalks than to reach them in parts of the Mall interior through which most customers pass. I find that Plaintiffs cannot distribute handbills as effectively from the public streets and sidewalks as they can from the Mall interior." (Pet. App. 11a, 308 Fed. Supp. at 131)

The finding is fully supported by the evidence. The

One of the letters also stated Lloyd Corp.'s belief "that our convenient location and setting would provide the largest audience President Johnson and Senator Humphrey could attract in Oregon." Pl. Ex. 20, 21, A. 186-189.

single structure constituting the main part of the shopping center, situated on 8 former city blocks and vacated street areas, has the majority of the shopping center's tenants and the greatest interior auto parking and pedestrian traffic. A. 18, 58, 64. As Lloyd Corp. intended in its design (A. 86), many persons arriving at the shopping center by automobile will go upon the exterior public sidewalks only when crossing them in driving in and out of the interior parking areas.[11] The lanes for such access and egress are two-way. Pl. Ex. 11A, -B, -D, -E, A. 129-131. Distribution of leaflets to persons entering or leaving the shopping center parking lots by automobile would involve substantial risks of safety and obstruction of traffic. Automobiles entering the parking lot traffic lanes need not stop before crossing the public sidewalk. Anyone attempting to hand a leaflet to the driver of an automobile crossing the public sidewalks outbound from the parking lots would be required to stand in the inbound automobile lane. Compare *Logan Valley*, 391 U.S. at 322.

The evidence is clear that distribution of leaflets by Respondents on exterior public sidewalks could not reach a substantial portion of the public coming to the shopping center by automobile and parking in its vast interior parking lots.

The requirement that no other effective means be

[11] The shopping center has more than 850,000 square feet of open and covered parking space affording offstreet parking for more than 1,000 vehicles. A. 18. The Corporation can apparently provide 8,000 free parking spaces within an easy walk from the central mall, of which 3,500 are under cover. Pl. Ex. 21, A. 189.

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

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FILED
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MICHAEL RODAK, JR., CLERK

No. 71-492

LLOYD CORPORATION, LTD.,
Petitioner,

v.

DONALD M. TANNER, ET AL.,
Respondents.

BRIEF OF PEOPLE'S LOBBY, INC., AS AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

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state law to prohibit any use of their property by others without their consent. However, unlike the situation involving a person's home, no meaningful claim to protection of a right of privacy can be advanced by respondents here. Nor on the facts of the case can any significant claim of protection of the normal business operation of the property be raised. Naked title is essentially all that is at issue."

No greater interference with Lloyd Corp.'s property rights and the ordinary uses of its property are evident in this case than the picketing and handbilling by the union members in *Logan Valley*.

To permit shopping center owners to prohibit peaceful and orderly communication to the public by distribution of handbills on the functional equivalents of public sidewalks of a business district would be a large step backward in the protection heretofore afforded by the First and Fourteenth Amendments to freedom of speech and press for all people.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit in this case should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-492

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On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

---

BRIEF OF PEOPLE'S LOBBY, INC., AS AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

This amicus brief is filed by People's Lobby, Inc. ("People's Lobby") pursuant to written permission of counsel for petitioner (who gave his consent after this Court granted the motions of Homart Development Co. and American Retail Federation) and counsel for respondents.

INTEREST OF THE AMICUS CURIAE

People's Lobby is a non profit California corporation consisting of volunteer citizens who utilize California's initiative process for the purpose of direct legislation. For the

purpose of direct legislation. For the past two and one half years People's Lobby has conducted anti pollution campaigns through litigation and the initiative process.

Simply stated, the initiative process in California consists of the placement of proposed legislation on the statewide (or county or city) ballot for voter approval by the collection of thousands of registered voters' signatures on petitions containing the legislative proposal.

The People's Lobby launched its first campaign in August 1969 by attempting to place two environmental measures on the June or November 1970 statewide ballot. In order to collect the required number of signatures (520,000 for the proposed state constitutional amendment and 325,000 for the proposed statute amendments) in the short period allowed by law (150 days) People's Lobby volunteer petition carriers were forced to go where substantial numbers of persons frequented on foot, e.g., shopping centers. Thus, Inland Center, a huge 75 store shopping center located in San Bernardino County and owned by Homart Development Co., became the site of signature gathering until People's Lobby volunteers were compelled to leave in October 1970. That prompted the filing to enjoin interference with the right to collect signatures on the premises of Inland Center, which was rejected first by the Superior Court, and then by the Court of Appeal, Fourth Appellate District, *Diamond v. Bland*, 87 Cal. Rptr. 97 (1970). In the meantime the signature drive ended in failure and the measures did not appear on the ballot.

Nevertheless, People's Lobby pursued the matter in the California Supreme Court because of its intention to try again. On December 7, 1970 a new initiative drive was launched to qualify the "Clean Environment Act" for the next general statewide election. This new

drive was mentioned by the California Supreme Court on December 16, 1970 when it reversed the Superior Court decision (the Court of Appeal decision having previously been vacated when the Supreme Court originally granted a hearing) and held that the People's Lobby did in fact have the right, subject to reasonable regulation, to go onto the premises of Inland Center for the purpose of the peaceful and orderly gathering of signatures on petitions and dissemination of information in connection therewith:

> "...[P]laintiffs have filed a new petition with the Secretary of State and have announced resumption of a campaign to qualify an initiative measure for the next state election."
>
> *Diamond v. Bland*, 3 Cal.3d 653, 657(1970).

Greatly assisted by this decision, the People's Lobby proceeded to gather over 326,000 valid signatures of registered voters and in May 1971 the Clean Environment Act qualified for the June 6, 1972 California statewide election. During the signature gathering campaign throughout California hundreds of volunteer petition carriers went forth to gather the signatures of fellow citizens who, dissatisfied with the failure of the California legislature to enact meaningful environmental legislation, eagerly signed the Clean Environment Act petitions. The drive was conducted peacefully and without the violence a frustrated public might engage in if denied the opportunity to participate in the direct democratic process of the initiative.

Just as the respondents in *Homart Development Co. v. Diamond*, cert. den. 402

U.S. 988 (May 17, 1971) acted peacefully and orderly at all times, voluntarily leaving the premises of Inland Center when requested to do so, and then seeking redress in the courts, other People's Lobby volunteers have also acted peacefully.

In summary, the interest of the People's Lobby lies in its utilization of large commercial shopping centers not unlike the one involved in the instant case. A decision adverse to respondents herein could very well terminate the People's Lobby's initiative activities in California.

ARGUMENT

I

THE FIRST AMENDMENT PERMITS ORDERLY AND PEACEFUL HANDBILLING, PICKETING, AND SIGNATURE GATHERING ON PRIVATE PROPERTY WHICH HAS BEEN GENERALLY OPENED TO THE PUBLIC

Once this Court's decision in *Marsh v. Alabama*, 326 U.S. 501 (1946) is accepted as valid precedent, it must then be recognized that, like most constitutional litigation, a balance must be struck that will accomodate the interests of all concerned. In attempting to strike the proper constitutional balance between the First and Fifth Amendments, one must consider not only the benefit to the one side but the detriment to the other.

The benefit to those seeking to engage in First Amendment conduct is easily perceived, especially when the reality of modern day life is recognized. The advent of the automobile and the growth of the suburbs have created a situation wherein most members of the public are accessible only when they leave their automobiles and venture onto shopping center

sidewalks and malls. Persons seeking to communicate with their fellow citizens can no longer reach them except in so far as they are on foot at shopping centers. In California the people drive everywhere. They obviously cannot be contacted in their automobiles. They cannot be reached while they are at work, and more and more homeowners and tenants are prohibiting door to door solicitation, which is much too time consuming in any event. Thus, those seeking to communicate with others greatly benefit when permitted to do so on shopping centers. Without shopping center access, such persons would be effectively prevented from communicating their message. Television, radio, newspaper, and magazine media are beyond the range of most persons who must rely on the shopping center as a forum.

The detriment to shopping center owners is non existent. No one buys less good simply because he has taken the opportunity to sign a petition or receive a leaflet. If a customer goes to a shopping center to purcahse a particular item, there is no reason to suppose he will leave empty handed merely because he read the message on a picket. There would be no detriment if all shopping centers were subjected to the same requirement.

Numerous shopping centers have already been prohibited from denying access to those seeking to exercise First Amendment freedoms, and none have suffered. *Diamond v. Bland*, 3 Cal.3d 653(1970), cert. den. sub nom. *Homart Development Co. v. Diamond*, 402 U.S. 988(1971); *Sutherland v. South Center Shopping Center*, 3 Wash. App. 833(1971); *State v. Miller*, 280 Minn. 566(1968); *Tanner v. Lloyd Corp.*, 446 F.2d 545(9th Cir.1971); *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery*

A reversal by this Court will lead to feelings of frustration and hopelessness on the part of those persons who cannot afford to resort to television, radio, newspapers, or magazines to disseminate their message. Indeed, these "alternatives" are not even available to those like the People's Lobby who come within a particular provision of the First Amendment not capable of being exercised by way of the media: the petition clause.

II

THERE ARE NO REASONABLE ALTERNATIVES

The American Retail Federation, amicus curiae in support of petitioner Lloyd, proposes an unworkable and meaningless rule. It states that First Amendment activities may not be conducted on private premises open to the public unless there are no reasonable "effective alternative means of communication" available.

People's Lobby submits that as a matter of constitutional law there are no reasonably effective alternatives to shopping centers. They have replaced the downtown business district as the center of commercial activity. Those seeking to exercise First Amendment rights go to them because they provide access to large numbers of persons.

The proposed rule would increase litigation and involve difficult fact questions. The proposed rule provides no standards. How would the existence of reasonable alternatives be determined. Who would determine whether they were reasonable? Would, for example, a football stadium with a large crowd on a Sunday afternoon five miles from a shopping center be a reasonable alternative? Would the football fan, rushing to make the opening kickoff or fleeing to "beat the crowd" after

the game be compared to the shopper leisurely strolling through a mall and browsing at the windows?

The proposed rule would apparently require a movie theatre operator to permit First Amendment activity in the premises if there were no other business establishment within a substantial distance.

The rule would make no sense, and could not be applied to the type of activity involved in *Diamond v. Bland*, supra, where the People's Lobby was not merely "communicating" ideas (the speech clause of the First Amendment) but was collecting signatures on environmental initiative petitions (the petition clause of the First Amendment). The "petition clause" is frequently overlooked in discussions involving First Amendment free speech issues. Certainly the right to petition is not the same as free speech: they are mentioned separately in the First Amendment:

> "Congress shall make no law... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (Emphasis added.)

The California Constitution also recognizes the importance of the right to petition, and goes so far as to provide for direct legislation by the people.

Article I, Section 2 of the California Constitution provides as follows:

> "All political power is inherent in the people. Government is instituted for the protection,

security and benefit of the people, and they have the right to alter or reform the same whenever the public good may require it."

Article IV, Section 1 of the California Constitution provides as follows:

"The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum."

Article IV, Section 22 of the California Constitution provides in part as follows:

"(a) The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them."

"(b) An initiative measure may be prepared by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the voters for all candidates for Governor at the last gubernatorial election"

...

In California the figures are generally 325,000 signatures for statute initiatives and 520,000 signatures for constitutional

initiatives. California Elections Code Section 3507 provides that all signatures must be gathered within 90 days, and Section 3520 provides for a supplemental period of 40 days. Other provisions of the Elections Code provide for the possibility of an additional 20 days. Accordingly, at the most, People's Lobby, and other groups seeking to "petition the Government" by the California initiative process are afforded 150 days to gather the necessary signatures of registered voters. Experience has indicated that approximately 1/3 of all signatures gathered are invalid, which means substantially more than the numbers mentioned above must be gathered within 150 days to qualify a measure for the ballot.

The great number of signatures required and the short period of time alloted render illusory any contention that alternative means of communication may preclude access to shopping centers. The California Supreme Court recognized this in *Diamond v. Bland*, 3 Cal. 3d 653, 660, n.2:

> "Defendants also attempt to distinguish *Marsh* by insisting these plaintiffs can assert their First Amendment rights by means of mass media. It seems evident that mass media are particularly inappropriate for plaintiffs' purposes: no one has suggested how signatures can be obtained on initiative petitions by means of newspapers, radio, or television."

When petition circulation is involved it is meaningless to consider alternatives. Generally, all available locations must be used, and time pressures dictate that shopping centers, with their large number of persons on foot, be visited.

People's Lobby recognizes that the California initiative process is not necessarily coextensive with rights protected by the First Amendment. Nevertheless, for all practical purposes the right to petition is similar to California's initiative petition right because both involve the need for face to face contact. While non initiative petition campaigns do not necessarily have built in legal time limitations, they do nevertheless require speedy action. To show the President of the United States or Congress concern for a particular issue within a reasonable time after its occurence it is important for a citizen or an organization to collect thousands of signatures in a short period of time.

It should be pointed out that the right to petition differs from handbilling in that no litter is created because no literature is generally distributed.

Shopping center owners who have, by local zoning laws and building permits, been permitted by local governments to establish huge commercial centers which attract the public from downtown businesses, should not be permitted to prevent access to such persons who were formerly accessible in the downtown areas. If shopping center owners wish to bring the public to their premises by the thousands, they should be obligated to allow those members of the public to continue to exercise First Amendment freedoms formerly exercised at the downtown business district.

It should be noted that the First Amendment includes the right to receive information as well as the right to disseminate it, *Lamont v. Postmaster General*, 381 U.S. 301 (1965), and presumably the right to sign petitions as well as the right to

Worker's Union, 61 Cal. 2d 766(1964), cert. den. 380 U.S. 906(1965).

Indeed, there are numerous non-shopping cases wherein courts have ruled in favor of those seeking to exercise First Amendment rights on various kinds of property: *In re Lane*, 71 Cal.2d 872(1969)(labor union activity at single freestanding store); *In re Hoffman*, 67 Cal.2d 845(1967)("unrelated speech" in enclosed railroad station owned by three private railroad companies); *In re Wallace*, 3 Cal.3d 289(1970)("unrelated speech" within county fairgrounds open only upon payment of fee); Wolin v. Port of New York Authority, 392 F.2d 83(2nd Cir.), cert. den sub nom *Port of New York Authority v. Wolin*, 393 U.S. 940 (1968)("unrelated speech" in enclosed bus terminal); *Brayshaw and People's Lobby v. Sears, Roebuck and Co.*, California Superior Court (Los Angeles County), WEC 24032("unrelated speech" at single free standing store).

Reversal by this Court of the instant case can only lead to confusion and chaos for it is clear that the public believes that First Amendment activities may be conducted at those premises where substantial numbers of persons congregate in a manner that permits such activities without interference with or obstruction to other activities.

Voter registrars, volunteer leaflet distributors, petition circulators, and others who have, at various times, gone onto "private property" such as parking lots, shopping center malls, county fairgrounds for the noble purpose of communicating ideas to their fellow citizens, will be shocked if this Court, at this late date, tells them that they have been guilty of criminal trespass and ought not to repeat their past transgressions.

The rule suggested by the American Retail Federation also ignores this Court's admonition in *Schneider v. State*, 308 U.S. 147, 163 (1939): One is not to have the liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

III

REGULATIONS SHOULD NOT BE IMPOSED BY BUSINESS ESTABLISHMENTS

People's Lobby obviously concedes that all First Amendment activities must be peaceful and orderly. That is true whether they are conducted on private property or public streets. However, existing laws already prevent the disruption or disturbance of the peace. Anti litter ordinances already exist. If more laws are needed, the local governing bodies may adopt them. These laws are applicable to private property as well as public property.

The state or municipality involved rather than a private, self interested property owner should adopt the rules or regulations in order to permit citizen participation in the promulgation of such rules and regulations. Otherwise, persons seeking to exercise First Amendment rights will be subjected to prior restraints. In *People v. Brayshaw*, No. A-332 (California Superior Court, Riverside County), a petitioner solicitor for the People's Lobby was convicted of criminal trespass for refusing to agree in advance to certain regulations. The conviction was reversed because the regulations were found to be unreasonable. In the meantime the solicitor was denied access to a large shopping center.

People's Lobby would still prefer a decision permitting the shopping centers to enact reasonable regulations than a decision permitting them to absolutely bar First Amendment activities from their premises.

Shopping centers are not incapable of promulgating regulations. Indeed, in response to the numerous decisions previously mentioned, shopping centers have developed rules to govern conduct on their premises, and no significant problems have resulted therefrom.

Since this Court's decision in *Amalgamated Food Employees vs. Logan Valley Plaza, Inc.*, 391 U.S. 308(1968), First Amendment activities have been conducted on numerous shopping centers throughout the country without incident. Many people, in fact, believed that this Court's decision in *Logan Valley* covered all First Amendment activity, and was not limited to labor union picketing. The public will surely be surprised if this Court abruptly halts a tradition consistent with the spirit and purpose of the First Amendment.

CONCLUSION

For the reasons stated herein as well as those urged by Respondents, the Court is requested to affirm the decision of the court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Roger Jon Diamond, declare as follows: I am an attorney at law duly admitted to practice before the Supreme Court of the United States, and I am the attorney for amicus curiae People's Lobby, Inc., with respect to the accompanying Amicus Curiae brief.

On March 31, 1972, pursuant to Rule 33 of the Supreme Court Rules, I caused the within Brief of People's Lobby, Inc., as Amicus Curiae to be served on Petitioners, Respondents, and amici curiae American Retail Federation and Homart Development Co. by placing three copies thereof enclosed in a sealed envelope with first class postage thereon fully prepaid, in the United States mail at Los Angeles California, addressed as follows:

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Roger Jon Diamond

collect signatures on petitions. Accordingly attention should be focused on those who come onto the shopping center to shop as well as to receive the communications of others and to sign petitions. People have come to expect handbillers, petitioners, and picketers on shopping center premises. The record before this Court in *Homart Development Co. v. Diamond*, No. 1469 establishes that the late Senator Robert Kennedy, Congressman (now Senator) John Tunney, and Governor Ronald Reagan attempted to utilize the premises of Inland Center for political campaigning. The exercise of First Amendment rights on shopping centers and other similar types of property has in reality become a tradition in this country. A reversal of the decision of the Ninth Circuit in the instant case can only serve to destroy that tradition.

People's Lobby suggests as a rule that has long been law in this country: No one may disrupt or disturb any business activity. Various municipal ordinances describe in more detail the kind of conduct that would result in criminal prosecution. This rule would permit one or two petition carriers to go upon a shopping center mall but would deny those persons similar access to a restaurant, which also is open to the public. The reason is that one or two petition carriers do not disturb the business of a shopping center. The public is used to such activity at such locations. It is a part of America. On the other hand, it is not in keeping with the atmosphere or nature of a restaurant for persons to travel from table to table, disturbing the patrons.

This rule is better than the rule suggested by the America Retail Federation, which would open up a restaurant to First Amendment activity if it were situated on a highway with no other business establishments around.

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PETITIONER'S REPLY BRIEF

Respondents' brief seems basically designed to reargue this Court's decision in *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968). Their apparent position is that under the Constitution the rights of shopping center owners must in almost all cases be subordinated to the rights of individuals desiring to engage in speech activity. This Court in *Logan Valley*, however, declined to adopt this extreme position, recognizing that both shopping center owners and those desiring to engage in speech activity had important rights at stake.[1] After balancing these competing interests, the Court determined that there was a right of

[1] As this Court recently noted in *Lynch* v. *Household Finance Corp.*, 40 U.S.L.W. 4335, 4339-40 (March 23, 1972), there is no "dichotomy between personal liberties and property rights." Rather, "a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other."

access to shopping centers for picketing and handbilling activities where (1) these activities were directly related to one of the businesses being conducted on the shopping center premises and (2) the shopping center premises and adjacent public areas were arranged in such a way that, as a practical matter, it was necessary to use privately-owned areas for the picketing and handbilling in order to reach customers of the business which was the subject of criticism.

In our opening brief, we suggested that *Logan Valley* went as far as was appropriate and necessary to protect the First Amendment interests of those seeking access to shopping center premises and that *Logan Valley* should not be extended to cover activities unrelated to shopping center business or activities which could be conducted in public areas abutting and adjacent to the shopping center premises. We pointed out that Respondents' handbills in this case were entirely unrelated to the business of Lloyd Center or any of its tenants. We also pointed out that there was no lack of public areas in and around Lloyd Center where Respondents could distribute their antidraft handbills, and urged that Petitioner's policy of requiring handbilling to be conducted on the public areas in Lloyd Center was a proper regulation of the place of handbilling. We concluded that each of these separate and alternative grounds required reversal of the judgment below.

Respondents largely ignore these issues. They seem to assume that if they can establish that Lloyd Center is the "functional equivalent of a public business district" the decision below is correct and should be affirmed under the *Logan Valley* decision.

Initially, we note that Respondents' basic factual premise of functional equivalence is open to serious question, even though it was adopted by the District Court. As we have discussed in our opening brief, pages 18-19, the

shopping center mall portion of Lloyd Center is not open to the general public, and in general the invitation to enter the mall area is extended only to those desiring to come to the premises for business purposes. Moreover, here, unlike the situation in *Logan Valley*, there are no roadways or vehicular traffic in the interior areas where Respondents sought to distribute their handbills. Automobiles are entirely separated from the shopping area.[2] This situation is to be contrasted with that in *Logan Valley* where picketing and handbilling in a private roadway were involved, and the Court pointed out that

> "the roadways provided for vehicular movement *within the mall* and the sidewalks leading *from building to building*, are the functional equivalent of streets and sidewalks of a normal municipal business district." 391 U.S. at 319. (Italics added.)

Respondents suggest, however, that Lloyd Center is the functional equivalent of a public business district because certain public streets and sidewalks were vacated to enable Petitioner to construct its shopping center premises. Brief pp. 19-20. Without saying so explicitly, Respondents appear to suggest that the walkways in the shopping mall, where they sought to distribute handbills, occupy what at one time were public streets and sidewalks. In fact, this is not the case. These walkways do not parallel former public streets and sidewalks, and the areas that were public streets and sidewalks are now occupied by buildings and parking lots in the shopping center. *Compare* Ex. 27 (color diagram not reproduced in the Appendix) *with* Exs. 4-5, A. 116-17. And, when Lloyd Center was constructed, land of equal area was dedicated to the widening of existing public streets and sidewalks or the construction of new public streets and sidewalks which are now available for Respondents' handbilling activities.

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[2] Merchandise is delivered on the roof and parking is outside and in the basement.

In any event, a shopping center owner's rights are surely not diminished because the center was constructed on previously platted land rather than in an unplatted area.

Moreover, even if the Lloyd Center mall were the "functional equivalent of a public business district," this would be only the beginning of the analysis rather than the end, since *Logan Valley* itself makes clear that a finding of functional equivalence is in no way dispositive of the questions presented here. Rather, such a finding leads to the questions specifically reserved by the Court in *Logan Valley* and discussed in our opening brief, namely whether a shopping center must afford access for unrelated handbilling, and whether handbilling must be allowed if adjacent public areas are available for that purpose.

As we now discuss, Respondents' brief addresses these central issues only indirectly.

I. Respondents Have Failed To Demonstrate Either a Factual or a Legal Justification for Extending *Logan Valley* to Unrelated Handbilling

In their brief, Respondents assert that under *Logan Valley* no distinction should be made between handbilling which is related to the use of shopping center premises and that which is unrelated. Brief pp. 11, 27. As we have discussed in our opening brief, page 21, in the experience of Lloyd Center handbilling is distracting and substantially detrimental to business. However, relying on numerous newspaper and magazine articles relating to the growth of shopping centers—which are not part of the record in this Court—Respondents argue that if shopping center owners were permitted to prohibit unrelated speech activities, the public's need for information would be unduly restricted. Respondents claim too much in this respect. Despite the growth of shopping centers in the United States, massive public areas are available, and will remain available, for speech activities. More-

over, it seems likely that coincident with the growth of shopping centers there has been a comparable growth in public streets and other areas available for handbilling activities. In the City of Portland alone there are literally thousands of linear blocks of public sidewalks including the 66 which are within Lloyd Center, as well as numerous additional public areas like Holladay Park in Lloyd Center, which Respondents admit were available to them for handbilling.

Respondents also erroneously suggest that *Logan Valley* adopted the reasoning which they suggest, and that its basic rationale is that the rights of a shopping center owner must be subordinated to the public's need for information. Respondents assert that this rationale applies equally to related and unrelated speech activities. But *Logan Valley* does not rest upon this ground.[3] Rather, the *Logan Valley* opinion justified the invasion of shopping center owners' property rights in order to prevent businesses in shopping centers from immunizing themselves from criticism "by creating a *cordon sanitaire* of parking lots around their stores." 391 U.S. at 325.[4] This

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[3] On page 17 of their brief, Respondents incorrectly say that *Marsh* v. *Alabama*, 326 U.S. 501 (1946), was extended to shopping centers in *Logan Valley*. That is a superficial misinterpretation that the Court sought to avoid with the language in footnote 9 and elsewhere in the opinion, expressly limiting the decision to speech activities that were related to the owner's use of the land.

[4] At page 21 of their brief, referring to the *Logan Valley* decision Respondents say that "freedom of communication would be restricted in direct proportion to the continued growth of private shopping centers," and follow this with a quotation from *Logan Valley* (391 U.S. at 324) stated to be in context therewith. Reference to the *Logan Valley* opinion shows, however, that the quotation cited by Respondents with reference to economic development of shopping centers in the United States over the last twenty years was intended as an illustration to the paragraph immediately following it which discusses only the need to permit related handbilling. That paragraph reads

> "These figures illustrate the substantial consequences for workers seeking to challenge substandard working conditions,

reasoning, of course, has no application whatever to unrelated speech activities. Indeed, the express rationale and purpose of *Logan Valley* illustrates the importance —actually the necessity—of the element of a special relationship between the particular message distributed and the owner's use of the land.

Finally, Respondents in this Court appear to urge a ground for affirmance which was not adopted by the courts below, namely, that Petitioner cannot bar Respondents' unrelated handbilling activities from its premises because it engaged in general promotional and related activities for the purpose of furthering the business of the center. Brief pp. 34-39. In this connection, Respondents rely on several cases which have held that discrimination is unconstitutional at places that are owned, financed or controlled by the government. These cases are inapplicable here. Respondents cite only two—neither of which was decided by this Court—that involved a claimed right of access for speech activities. *Wolin* v. *Port of New York Authority*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968); *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438 (S.D.N.Y. 1967). Neither case is pertinent here because, in both, the property involved was owned by the government.[5] The mall area of

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consumers protesting shoddy or overpriced merchandise, and minority groups seeking nondiscriminatory hiring policies that a contrary decision here would have. Business enterprises located in downtown areas would be subject to on-the-spot public criticism for their practices, but businesses situated in the suburbs could largely immunize themselves from similar criticism by creating a *cordon sanitaire* of parking lots around their stores. Neither precedent nor policy compels a result so at variance with the goal of free expression and communication that is the heart of the First Amendment." *Id.* at 324-25.

[5] The other cases cited, like *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), and *Evans* v. *Newton*, 382 U.S. 296 (1966), all involved racial and related forms of discrimination. Moreover, like *Wolin* and *Kissinger*, they involved property owned or operated by the public and thus have no application here.

Lloyd Center is a private shopping center complex, not a transit system or bus terminal owned by the government, and the rights of a private business involved must be weighed in the balance.

Petitioner is not a public body and is not an eleemosynary association. Petitioner invites and permits people to come on its premises. It urged them to do so. It creates situations to cause them to come. It treats them well while they are there, and wants them to stay and to come back. But Petitioner does so for business purposes and as a merchandiser only. The record in this case is clear that in deciding whether to allow persons to come onto the mall area for solicitation or other activities, Petitioner was exercising a normal business judgment. *See* A. 51-59, 71, 93-95. Petitioner's president stated the essence of its policy on such activities as follows:

> "I think our position has been to exclude them. There have been a few exceptions made because we felt they were good for the center; they would bring people there and it was customer motivation." A. 95.

Contrary to Respondents' suggestion, Petitioner has not discriminated among handbillers on the ground that it approves or disapproves of the content of the particular speech involved. In the area of handbilling Petitioner made no exceptions to its uniform rule prohibiting all handbilling—whether commercial or non-commercial and whether conducted by a tenant of the center or an outsider.[6]

Under these circumstances, we suggest, it is plain that neither the *Wolin* nor the *Kissinger* decision has anything whatever to do with this case, and this Court

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[6] As noted in our opening brief, page 5, an exception was made, subsequent to *Logan Valley*, for related handbilling.

should hold that Petitioner may permissibly bar unrelated handbilling from its premises.

II. Respondents Concede That Shopping Center Property Need Not Be Made Available for Handbilling Activities If Alternative Public Areas Are Available. Respondents Have Made No Showing Here That the Alternative Public Areas at Lloyd Center Were Inadequate for Handbill Distribution

In our opening brief, we urged an alternative ground for reversal of the judgment below, namely that the record in this case demonstrates that, unlike the situation in *Logan Valley*, there were substantial public areas adjacent to Petitioner's shopping center buildings which were available for Respondents' handbilling activities. In their brief, Respondents virtually concede that where alternative areas are available for handbilling, that activity may be banned from shopping center premises. Thus, on page 35 of their brief, Respondents state:

> "It may be that First Amendment guarantees do not extend to private property open to and used by the general public in certain peculiar and limited circumstances. *Where all who enter a store or other particular private property may be as effectively reached by communication of the message on nearby public sidewalks, there is no need for exercise of the expression on private property.*" (Italics added.)

Having made this concession, Respondents could have been expected to demonstrate why the mall at Lloyd Center was the only place in the shopping center area where they could effectively distribute their message. There is no such demonstration in Respondents' brief or in the record of this case.

Respondents do suggest that handbill distribution would be dangerous in public areas adjacent to Lloyd Center.

Although the District Court stated that handbilling in these areas would "perhaps" be hazardous, there is no evidence in the record on this issue,[7] and we note that these public areas were selected by Respondents for their handbilling activities after they were asked to leave the interior mall area.

Respondents also seem to argue that the District Court found that use of Petitioner's property was necessary for the effective distribution of Respondents' message. In fact, the District Court carefully refrained from finding that Respondents' handbills could not be effectively distributed from the public streets and sidewalks. Rather, the court found only that handbills could not be distributed "as effectively" in the public areas as they could in the mall. Pet. App. 11a. This hardly constitutes a finding that it was necessary for Respondents to be allowed to invade the private property of Petitioner in order to give them a reasonable opportunity to express their ideas. As the Court said in *Adderley* v. *Florida*, 385 U.S. 39, 48 (1966), there is no constitutional right to propagandize "whenever and however and wherever" one pleases.

Finally, in an effort to avoid the critical gap in their case, Respondents for the first time in this Court make the remarkable contention that Petitioner had the burden of proof on this issue and that Petitioner failed to establish that Respondents could effectively distribute their handbills in the public areas adjacent to Lloyd Cen-

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[7] Clearly with respect to those who come to the shopping center by foot or bus, no such hazards exist. Respondents suggest that handbillers could not distribute their leaflets from the driver's side of the two-lane entrances and exits to the center's parking areas without disrupting traffic and possibly endangering themselves. Brief p. 31. No such evidence exists in the record. Moreover, Respondents suggest no reason why they could not distribute their handbills on the passenger side of vehicles at the time they stop at the parking lot exits.

ter. In fact, the record clearly shows that such publicly-owned areas were available. As discussed in Petitioner's initial brief, there are fully 66 linear blocks of public sidewalks in Lloyd Center itself available for Respondents' handbilling, and Respondents had the opportunity to reach all of the Lloyd Center customers as they entered or departed the mall area. In any event, Respondents were plaintiffs in this case below and had the burden of proving their case. They cannot shift this burden to Petitioner. This clearly is not a case in which the defendant is more likely than the plaintiff to have the information on which the issue may be decided, and no other reason is suggested for reallocating the traditional burden of proof to the defendant in the court below.

CONCLUSION

For the reasons stated here and in Petitioner's opening brief, the judgment below should be reversed.

Respectfully submitted,

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April 14, 1972

Syllabus

LLOYD CORP., LTD. v. TANNER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71–492. Argued April 18, 1972—Decided June 22, 1972

Respondents sought to distribute handbills in the interior mall area of petitioner's large privately owned shopping center. Petitioner had a strict no-handbilling rule. Petitioner's security guards requested respondents under threat of arrest to stop the handbilling, suggesting that they could resume their activities on the public streets and sidewalks adjacent to but outside the center, which respondents did. Respondents, claiming that petitioner's action violated their First Amendment rights, thereafter brought this action for injunctive and declaratory relief. The District Court, stressing that the center is "open to the general public" and "the functional equivalent of a public business district," and relying on *Marsh* v. *Alabama*, 326 U. S. 501, and *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U. S. 308, held that petitioner's policy of prohibiting handbilling within the mall violated respondents' First Amendment rights. The Court of Appeals affirmed. *Held:* There has been no dedication of petitioner's privately owned and operated shopping center to public use so as to entitle respondents to exercise First Amendment rights therein that are unrelated to the center's operations; and petitioner's property did not lose its private character and its right to protection under the Fourteenth Amendment merely because the public is generally invited to use it for the purpose of doing business with petitioner's tenants. The facts in this case are significantly different from those in *Marsh*, *supra*, which involved a company town with "all the attributes" of a municipality, and *Logan Valley*, *supra*, which involved labor picketing designed to convey a message to patrons of a particular store, so located in the center of a large private enclave as to preclude other reasonable access to store patrons. Under the circumstances present in this case, where the handbilling was unrelated to any activity within the center and where respondents had adequate alternative means of communication, the courts below erred in holding those decisions controlling. Pp. 556–570.

446 F. 2d 545, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which DOUGLAS, BRENNAN, and STEWART, JJ., joined, *post*, p. 570.

George Black, Jr., argued the cause for petitioner. With him on the briefs were *Robert J. Miller*, *John H. Pickering*, and *Timothy B. Dyk*.

Carl R. Neil argued the cause for respondents. With him on the brief were *Melvin L. Wulf* and *Sanford Jay Rosen*.

Briefs of *amici curiae* urging reversal were filed by *Jerry Kronenberg*, *Gerard C. Smetana*, and *Alan Raywid* for the American Retail Federation, and by *Lawrence M. Cohen* and *Allen B. Gresham* for the Homart Development Co.

Roger Jon Diamond filed a brief for People's Lobby, Inc., as *amicus curiae* urging affirmance.

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question reserved by the Court in *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U. S. 308 (1968), as to the right of a privately owned shopping center to prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operations. Relying primarily on *Marsh* v. *Alabama*, 326 U. S. 501 (1946), and *Logan Valley*, the United States District Court for the District of Oregon sustained an asserted First Amendment right to distribute handbills in petitioner's shopping center, and issued a permanent injunction restraining petitioner from interfering with such right. 308 F. Supp. 128 (1970). The Court of Appeals for the Ninth Circuit affirmed, 446 F. 2d 545 (1971). We granted certiorari to consider petitioner's contention that the decision below

violates rights of private property protected by the Fifth and Fourteenth Amendments. 404 U. S. 1037 (1972).

Lloyd Corportion, Ltd. (Lloyd), owns a large, modern retail shopping center in Portland, Oregon. Lloyd Center embraces altogether about 50 acres, including some 20 acres of open and covered parking facilities which accommodate more than 1,000 automobiles. It has a perimeter of almost one and one-half miles, bounded by four public streets. It is crossed in varying degrees by several other public streets, all of which have adjacent public sidewalks. Lloyd owns all land and buildings within the Center, except these public streets and sidewalks. There are some 60 commercial tenants, including small shops and several major department stores.

The Center embodies a relatively new concept in shopping center design. The stores are all located within a single large, multi-level building complex sometimes referred to as the "Mall." Within this complex, in addition to the stores, there are parking facilities, malls, private sidewalks, stairways, escalators, gardens, an auditorium, and a skating rink. Some of the stores open directly on the outside public sidewalks, but most open on the interior privately owned malls. Some stores open on both. There are no public streets or public sidewalks within the building complex, which is enclosed and entirely covered except for the landscaped portions of some of the interior malls.

The distribution of the handbills occurred in the malls. They are a distinctive feature of the Center, serving both utilitarian and esthetic functions. Essentially, they are private, interior promenades with 10-foot sidewalks serving the stores, and with a center strip 30 feet wide in which flowers and shrubs are planted, and statuary, fountains, benches, and other amenities are located. There is no vehicular traffic on the malls. An archi-

tectural expert described the purpose of the malls as follows:

> "In order to make shopping easy and pleasant, and to help realize the goal of maximum sales [for the Center], the shops are grouped about special pedestrian ways or malls. Here the shopper is isolated from the noise, fumes, confusion and distraction which he normally finds along city streets, and a controlled, carefree environment is provided . . . ." [1]

Although the stores close at customary hours, the malls are not physically closed, as pedestrian window shopping is encouraged within reasonable hours.[2] Lloyd employs 12 security guards, who are commissioned as such by the city of Portland. The guards have police authority within the Center, wear uniforms similar to those worn by city police, and are licensed to carry handguns. They are employed by and subject to the control of Lloyd. Their duties are the customary ones, including shoplifting surveillance and general security.

At a few places within the Center, small signs are embedded in the sidewalk which state:

"NOTICE—Areas In Lloyd Center Used By The

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[1] App. 254.

[2] The manager of the Center testified:

"Q. Turning now to the general policy in operation of the Lloyd Center, it's true that the malls and walkways within the center are open 24 hours a day; is that right?

"A. Well, they aren't physically closed such as putting a gate across, no. But, they are not—when people are there after hours, they are watched. And, if it is too late at night, they are told the places are closed and they should leave.

"Q. If I wanted to walk through the center malls of Lloyd Center at 3:00 in the morning, would anyone stop me?

"A. Depending on who the officer was on duty as to what he is supposed to do. But, they would have made inquiry and followed you to see what you are doing." App. 49.

Public Are Not Public Ways But Are For The Use Of Lloyd Center Tenants And The Public Transacting Business With Them. Permission To Use Said Areas May Be Revoked At Any Time. Lloyd Corporation, Ltd."

The Center is open generally to the public, with a considerable effort being made to attract shoppers and prospective shoppers, and to create "customer motivation" as well as customer goodwill in the community. In this respect the Center pursues policies comparable to those of major stores and shopping centers across the country, although the Center affords superior facilities for these purposes. Groups and organizations are permitted, by invitation and advance arrangement, to use the auditorium and other facilities. Rent is charged for use of the auditorium except with respect to certain civic and charitable organizations, such as the Cancer Society and Boy and Girl Scouts. The Center also allows limited use of the malls by the American Legion to sell poppies for disabled veterans, and by the Salvation Army and Volunteers of America to solicit Christmas contributions. It has denied similar use to other civic and charitable organizations. Political use is also forbidden, except that presidential candidates of both parties have been allowed to speak in the auditorium.[3]

The Center had been in operation for some eight years when this litigation commenced. Throughout this period it had a policy, strictly enforced, against the distribution of handbills within the building complex and its malls. No exceptions were made with respect to handbilling, which was considered likely to annoy customers, to create litter, potentially to create disorders,

[3] The manager of the Center, explaining why presidential candidates were allowed to speak, said: "We do that for one reason and that is great public interest. It . . . brings a great many people to Lloyd Center who may shop before they leave." App. 51.

and generally to be incompatible with the purpose of the Center and the atmosphere sought to be preserved.

On November 14, 1968, the respondents in this case distributed within the Center handbill invitations to a meeting of the "Resistance Community" to protest the draft and the Vietnam war. The distribution, made in several different places on the mall walkways by five young people, was quiet and orderly, and there was no littering. There was a complaint from one customer. Security guards informed the respondents that they were trespassing and would be arrested unless they stopped distributing the handbills within the Center.[4] The guards suggested that respondents distribute their literature on the public streets and sidewalks adjacent to but outside of the Center complex. Respondents left the premises as requested "to avoid arrest" and continued the handbilling outside. Subsequently this suit was instituted in the District Court, seeking declaratory and injunctive relief.

I

The District Court, emphasizing that the Center "is open to the general public," found that it is "the functional equivalent of a public business district." 308 F. Supp., at 130. That court then held that Lloyd's "rule prohibiting the distribution of handbills within the Mall violates . . . First Amendment rights." 308 F. Supp., at 131. In a *per curiam* opinion, the Court of Appeals held that it was bound by the "factual determination" as to the character of the Center, and concluded that the decisions of this Court in *Marsh* v. *Alabama*, 326 U. S. 501 (1946), and *Amalgamated Food*

[4] The city of Portland has an ordinance which makes it unlawful to trespass on private property. Portland, Ore., Police Code § 16-613.

Employees Union v. *Logan Valley Plaza*, 391 U. S. 308 (1968), compelled affirmance.[5]

Marsh involved Chickasaw, Alabama, a company town wholly owned by the Gulf Shipbuilding Corp. The opinion of the Court, by Mr. Justice Black, described Chickasaw as follows:

> "Except for [ownership by a private corporation] it has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area. The town and the surrounding neighborhood, which can not be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center. To do so, they now, as they have for many years, make use of a company-owned paved street and sidewalk located alongside the store fronts in order to enter and leave the stores and the post office. Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of thirty feet. There is nothing to stop

[5] The Court of Appeals also relied on *Wolin* v. *Port of New York Authority*, 392 F. 2d 83 (CA2 1968).

> highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation." 326 U. S., at 502–503.

A Jehovah's Witness undertook to distribute religious literature on a sidewalk near the post office and was arrested on a trespassing charge. In holding that First and Fourteenth Amendment rights were infringed, the Court emphasized that the business district was within a company-owned town, an anachronism long prevalent in some southern States and now rarely found.[6]

In *Logan Valley* the Court extended the rationale of *Marsh* to peaceful picketing of a store located in a large shopping center, known as Logan Valley Mall, near Altoona, Pennsylvania. Weis Markets, Inc. (Weis), an original tenant, had opened a supermarket in one of the larger stores and was employing a wholly nonunion staff. Within 10 days after Weis opened, members of Amalgamated Food Employees Union Local 590 (Union) began picketing Weis, carrying signs stating that it was a nonunion market and that its employees were not receiving union wages or other union benefits. The picketing, conducted by nonemployees, was carried out

[6] In commenting on the necessity for citizens who reside in company towns to have access to information, the Court said: "Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed." 326 U. S., at 508.

almost entirely in the parcel pickup area immediately adjacent to the store and on portions of the adjoining parking lot. The picketing was peaceful, with the number of pickets varying from four to 13.

Weis and Logan Valley Plaza, Inc., sought and obtained an injunction against this picketing. The injunction required that all picketing be confined to public areas outside the shopping center. On appeal the Pennsylvania Supreme Court affirmed the issuance of the injunction, and this Court granted certiorari. In framing the question, this Court stated:

> "The case squarely presents . . . the question whether Pennsylvania's generally valid rules against trespass to private property can be applied in these circumstances to bar petitioners from the Weis and Logan premises." 391 U. S., at 315.

The Court noted that the answer would be clear "if the shopping center premises were not privately owned but instead constituted the business area of a municipality." *Ibid.* In the latter situation, it has often been held that publicly owned streets, sidewalks, and parks are so historically associated with the exercise of First Amendment rights that access to them for purposes of exercising such rights cannot be denied absolutely. *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Hague* v. *CIO*, 307 U. S. 496 (1939); *Schneider* v. *State*, 308 U. S. 147 (1939); *Jamison* v. *Texas*, 318 U. S. 413 (1943).

The Court then considered *Marsh* v. *Alabama*, *supra*, and concluded that:

> "The shopping center here is clearly the functional equivalent of the business district of Chickasaw involved in *Marsh*." 391 U. S., at 318.

But the Court was careful not to go further and say that for all purposes and uses the privately owned streets,

sidewalks, and other areas of a shopping center are analogous to publicly owned facilities;

> "All we decide here is that because the shopping center serves as the community business block 'and is freely accessible and open to the people in the area and those passing through,' *Marsh* v. *Alabama*, 326 U. S., at 508, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put." 391 U. S., at 319–320.

The Court noted that the scope of its holding was limited, and expressly reserved judgment on the type of issue presented in this case:

> "The picketing carried on by petitioners was directed specifically at patrons of the Weis Market located within the shopping center and the message sought to be conveyed to the public concerned the manner in which that particular market was being operated. We are, therefore, not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put." *Id.*, at 320 n. 9.

The Court also took specific note of the facts that the Union's picketing was "directed solely at one establishment within the shopping center," *id.*, at 321, and that the public berms and sidewalks were "from 350 to 500 feet away from the Weis store." *Id.*, at 322. This distance made it difficult "to communicate [with] patrons of Weis" and "to limit [the] effect [of

the picketing] to Weis only." *Id.*, at 322, 323.[7] *Logan Valley* was decided on the basis of this factual situation, and the facts in this case are significantly different.

II

The courts below considered the critical inquiry to be whether Lloyd Center was "the functional equivalent of a public business district."[8] This phrase was first used in *Logan Valley*, but its genesis was in *Marsh*. It is well to consider what *Marsh* actually decided. As noted above, it involved an economic anomaly of the past, "the company town." One must have seen such towns to understand that "functionally" they were no different from municipalities of comparable size. They developed primarily in the Deep South to meet economic conditions, especially those which existed following the Civil War. Impoverished States, and especially backward areas thereof, needed an influx of industry and capital. Corporations attracted to the area by natural resources and abundant labor were willing to assume the role of local government. Quite literally, towns

[7] The Court also commented on the increasing role of shopping centers and on the problem which they would present with respect to union activities if picketing were totally proscribed within shopping center areas: "Business enterprises located in downtown areas [on public streets and sidewalks] would be subject to on-the-spot public criticism for their [labor] practices, but businesses situated in the suburbs could largely immunize themselves from similar criticism by creating a *cordon sanitaire* of parking lots around their stores." 391 U. S., at 324–325. The concurring opinion of MR. JUSTICE DOUGLAS also emphasized the related purpose of the picketing in *Logan Valley*: "Picketing in regard to labor conditions at the Weis Supermarket is directly related to that shopping center business." 391 U. S., at 326.

[8] 308 F. Supp. 128, 130, 132 (Ore. 1970); 446 F. 2d 545, 546 (CA9 1971).

were built and operated by private capital with all of the customary services and utilities normally afforded by a municipal or state government: there were streets, sidewalks, sewers, public lighting, police and fire protection, business and residential areas, churches, postal facilities, and sometimes schools. In short, as Mr. Justice Black said, Chickasaw, Alabama, had "all the characteristics of any other American town." 326 U. S., at 502. The Court simply held that where private interests were substituting for and performing the customary functions of government, First Amendment freedoms could not be denied where exercised in the customary manner on the town's sidewalks and streets. Indeed, as title to the entire town was held privately, there were no publicly owned streets, sidewalks, or parks where such rights could be exercised.

Logan Valley extended *Marsh* to a shopping center situation in a different context from the company town setting, but it did so only in a context where the First Amendment activity was related to the shopping center's operations. There is some language in *Logan Valley*, unnecessary to the decision, suggesting that the key focus of *Marsh* was upon the "business district," and that whenever a privately owned business district serves the public generally its sidewalks and streets become the functional equivalents of similar public facilities.[9] As Mr. Justice Black's dissent in *Logan Valley* emphasized, this would be an incorrect interpretation of the Court's decision in *Marsh*:[10]

> "*Marsh* was never intended to apply to this kind of situation. *Marsh* dealt with the very special

[9] *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U. S. 308, 319 (1968).

[10] As Mr. Justice Black was the author of the Court's opinion in *Marsh*, his analysis of its rationale is especially meaningful.

> situation of a company-owned town, complete with streets, alleys, sewers, stores, residences, and everything else that goes to make a town. The particular company town involved was Chickasaw, Alabama, which, as we stated in the opinion, except for the fact that it 'is owned by the Gulf Shipbuilding Corporation . . . has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated.' 326 U. S., at 502. Again toward the end of the opinion we emphasized that 'the town of Chickasaw does not function differently from any other town.' 326 U. S., at 508. I think it is fair to say that the basis on which the *Marsh* decision rested was that the property involved encompassed an area that for all practical purposes had been turned into a town; the area had all the attributes of a town and was exactly like any other town in Alabama." 391 U. S., at 330–331.

The holding in *Logan Valley* was not dependent upon the suggestion that the privately owned streets and sidewalks of a business district or a shopping center are the equivalent, for First Amendment purposes, of municipally owned streets and sidewalks. No such expansive reading of the opinion of the Court is necessary or appropriate. The opinion was carefully phrased to limit its holding to the picketing involved, where the picketing was "directly related in its purpose to the use to which the shopping center property was being put," 391 U. S., at 320 n. 9, and where the store was located in the center of a large private enclave with the consequence that no other reasonable opportunities for the pickets to convey their message to their intended audience were available.

Neither of these elements is present in the case now before the Court.

A

The handbilling by respondents in the malls of Lloyd Center had no relation to any purpose for which the center was built and being used.[11] It is nevertheless argued by respondents that, since the Center is open to the public, the private owner cannot enforce a restriction against handbilling on the premises. The thrust of this argument is considerably broader than the rationale of *Logan Valley*. It requires no relationship, direct or indirect, between the purpose of the expressive activity and the business of the shopping center. The message sought to be conveyed by respondents was directed to all members of the public, not solely to patrons of Lloyd Center or of any of its operations. Respondents could have distributed these handbills on any public street, on any public sidewalk, in any public park, or in any public building in the city of Portland.

Respondents' argument, even if otherwise meritorious, misapprehends the scope of the invitation extended to the public. The invitation is to come to the Center to do business with the tenants. It is true that facilities at the Center are used for certain meetings and

[11] The injunction issued against Lloyd is comprehensive. It enjoins Lloyd (and others in active concert or participation with it) from "preventing or interfering with the distribution of non-commercial handbills in a peaceful and orderly manner in the malls and walkways within Lloyd Center at times when they are open to general public access." There is no limitation as to type of literature distributed except that it must be "non-commercial." Nor, indeed, is there any limitation in this injunction as to the number of persons participating in such activities or the frequency thereof. Irrespective of how controversial, offensive, distracting, or extensive the distributions may be, Lloyd has been ordered to allow all noncommercial handbilling which anyone desires to undertake within its private premises.

for various promotional activities. The obvious purpose, recognized widely as legitimate and responsible business activity, is to bring potential shoppers to the Center, to create a favorable impression, and to generate goodwill. There is no open-ended invitation to the public to use the Center for any and all purposes, however incompatible with the interests of both the stores and the shoppers whom they serve.

MR. JUSTICE WHITE, dissenting in *Logan Valley*, noted the limited scope of a shopping center's invitation to the public:

> "In no sense are any parts of the shopping center dedicated to the public for general purposes . . . . The public is invited to the premises but only in order to do business with those who maintain establishments there. The invitation is to shop for the products which are sold. There is no general invitation to use the parking lot, the pickup zone, or the sidewalk except as an adjunct to shopping. No one is invited to use the parking lot as a place to park his car while he goes elsewhere to work. The driveways and lanes for auto traffic are not offered for use as general thoroughfares leading from one public street to another. Those driveways and parking spaces are not public streets and thus available for parades, public meetings, or other activities for which public streets are used." 391 U. S., at 338.

It is noteworthy that respondents' argument based on the Center's being "open to the public" would apply in varying degrees to most retail stores and service establishments across the country. They are all open to the public in the sense that customers and potential customers are invited and encouraged to enter. In terms of being open to the public, there are differences only

of degree—not of principle—between a free-standing store and one located in a shopping center, between a small store and a large one, between a single store with some malls and open areas designed to attract customers and Lloyd Center with its elaborate malls and interior landscaping.

B

A further fact, distinguishing the present case from *Logan Valley*, is that the Union pickets in that case would have been deprived of all reasonable opportunity to convey their message to patrons of the Weis store had they been denied access to the shopping center.[12] The situation at Lloyd Center was notably different. The central building complex was surrounded by public sidewalks, totaling 66 linear blocks. All persons who enter or leave the private areas within the complex must cross public streets and sidewalks, either on foot or in automobiles. When moving to and from the privately

[12] The Court's opinion in *Logan Valley* described the obstacles resulting from the location of the Weis store in the shopping center, and its relation to public streets and sidewalks: "Petitioners' picketing was directed solely at one establishment within the shopping center. The berms surrounding the center are from 350 to 500 feet away from the Weis store. All entry onto the mall premises by customers of Weis, so far as appears, is by vehicle from the roads alongside which the berms run. Thus the placards bearing the message which petitioners seek to communicate to patrons of Weis must be read by those to whom they are directed either at a distance so great as to render them virtually indecipherable—where the Weis customers are already within the mall—or while the prospective reader is moving by car from the roads onto the mall parking areas via the entrance ways cut through the berms. In addition, the pickets are placed in some danger by being forced to walk along heavily traveled roads along which traffic moves constantly at rates of speed varying from moderate to high. Likewise, the task of distributing handbills to persons in moving automobiles is vastly greater (and more hazardous) than it would be were petitioners permitted to pass them out within the mall to pedestrians." 391 U. S., at 321–322.

owned parking lots, automobiles are required by law to come to a complete stop. Handbills may be distributed conveniently to pedestrians, and also to occupants of automobiles, from these public sidewalks and streets. Indeed, respondents moved to these public areas and continued distribution of their handbills after being requested to leave the interior malls. It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Such an accommodation would diminish property rights without significantly enhancing the asserted right of free speech. In ordering this accommodation the courts below erred in their interpretation of this Court's decisions in *Marsh* and *Logan Valley*.

III

The basic issue in this case is whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against *all* handbilling. In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* action, not on action by the owner of private property used nondiscriminatorily for private purposes only. The Due Process Clauses of the Fifth and Fourteenth Amendments are also relevant to this case. They provide that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." There is the further proscription in the Fifth Amendment against the taking of "private property . . . for public use, without just compensation."

Although accommodations between the values protected by these three Amendments are sometimes nec-

essary, and the courts properly have shown a special solicitude for the guarantees of the First Amendment, this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only. Even where public property is involved, the Court has recognized that it is not necessarily available for speech, pickets, or other communicative activities. Mr. Justice Black, speaking for the Court in *Adderley* v. *Florida*, 385 U. S. 39 (1966), said:

> "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this 'area chosen for the peaceful civil rights demonstration was not only "reasonable" but also particularly appropriate . . . .' Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on, *Cox* v. *Louisiana*, [379 U. S.], at 554–555 and 563–564. We reject it again. The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose." 385 U. S., at 47–48.

Respondents contend, however, that the property of a large shopping center is "open to the public," serves the same purposes as a "business district" of a municipality, and therefore has been dedicated to certain types

of public use. The argument is that such a center has sidewalks, streets, and parking areas which are functionally similar to facilities customarily provided by municipalities. It is then asserted that all members of the public, whether invited as customers or not, have the same right of free speech as they would have on the similar public facilities in the streets of a city or town.

The argument reaches too far. The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use. The closest decision in theory, *Marsh* v. *Alabama, supra,* involved the assumption by a private enterprise of all of the attributes of a state-created municipality and the exercise by that enterprise of semi-official municipal functions as a delegate of the State.[13] In effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State. In the instant case there is no comparable assumption or exercise of municipal functions or power.

Nor does property lose its private character merely because the public is generally invited to use it for designated purposes. Few would argue that a free-standing store, with abutting parking space for customers, assumes significant public attributes merely because the public is invited to shop there. Nor is size alone the controlling factor. The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center. This is not to say that no differences may exist with respect to government regula-

[13] Mr. Justice Black, dissenting in *Logan Valley,* emphasized the distinction between a privately owned shopping center and the "company town" involved in *Marsh,* which he said had assumed "*all* the attributes" of a municipality. 391 U. S., at 332. (Original emphasis.)

tion of rights of citizens arising by virtue of the size and diversity of activities carried on within a privately owned facility serving the public. There will be, for example, problems with respect to public health and safety which vary in degree and in the appropriate government response, depending upon the size and character of a shopping center, an office building, a sports arena, or other large facility serving the public for commercial purposes. We do say that the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The Framers of the Constitution certainly did not think these fundamental rights of a free society are incompatible with each other. There may be situations where accommodations between them, and the drawing of lines to assure due protection of both, are not easy. But on the facts presented in this case, the answer is clear.

We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights. Accordingly, we reverse the judgment and remand the case to the Court of Appeals with directions to vacate the injunction.

It is so ordered.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE STEWART join, dissenting.

Donald Tanner, Betsy Wheeler, and Susan Roberts (respondents) brought this action for a declaratory judgment that they have the right under the First and Fourteenth Amendments to the United States Constitution to distribute handbills in a shopping center owned by petitioner and an injunction to enforce that right.

Relying primarily on our very recent decision in *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U. S. 308 (1968), the United States District Court for the District of Oregon granted the relief requested. 308 F. Supp. 128 (1970). The United States Court of Appeals for the Ninth Circuit affirmed. 446 F. 2d 545 (1971). Today, this Court reverses the judgment of the Court of Appeals and attempts to distinguish this case from *Logan Valley*. In my view, the distinction that the Court sees between the cases does not exist. As I read the opinion of the Court, it is an attack not only on the rationale of *Logan Valley*, but also on this Court's longstanding decision in *Marsh* v. *Alabama*, 326 U. S. 501 (1946). Accordingly, I dissent.

I

Lloyd Center is a large, modern retail shopping center in Portland, Oregon. Sprawling over 50 acres of land, the Center offers to shoppers more than 60 commercial businesses and professional offices. It also affords more than 850,000 square feet of open and covered offstreet parking space—enough to accommodate more than 1,000 vehicles. Bounded by four public streets, Lloyd Center has a perimeter of almost one and one-half miles. Four public streets running east-west and one running north-south traverse the Center, and at least six other public streets run partly into or around it. All of these streets have adjacent sidewalks. These streets and sidewalks are the only parts of the Center that are not privately owned.

The principal portion of the Center is occupied by a shopping area called the "Mall." Covering approximately 25 acres of land and having a perimeter of four-fifths of a mile, the Mall, in the words of the District Court, "is a multi-level complex of buildings, parking facilities, sub-malls, sidewalks, stairways, elevators, es-

calators, bridges, and gardens, and contains a skating rink, statues, murals, benches, directories, information booths, and other facilities designed to attract visitors and make them comfortable." 308 F. Supp., at 129. No public streets cross the Mall, but some stores face those streets that form the perimeter, and it is possible to enter those stores from public sidewalks. Other stores are located in the interior of the Mall, and can only be reached by using privately owned walkways.

On November 14, 1968, respondents entered the Mall and distributed handbills inviting the public to a meeting to protest the draft and the Vietnam war. The distribution was peaceful, nondisruptive, and litter-free. Security guards employed by the Center approached respondents, indicated that the Center did not permit handbilling in the Mall, suggested that they distribute their materials on the public sidewalks and streets, and informed them that they could be arrested if they persisted in handbilling within the privately owned portions of the Center. These guards wore uniforms that were virtually identical to those worn by regular Portland police and they possessed full police authority. Believing that they would be arrested if they did not leave the Mall, respondents departed and subsequently filed this lawsuit.[1]

A. The question presented in this case is whether one of the incidents of petitioner's private ownership of the Lloyd Center is the power to exclude certain

[1] There is some conflict in the testimony as to precisely what the guards told respondents with respect to the likelihood that they would be arrested if they did not leave the Mall. The Agreed Facts in the Pretrial Order states that the guards said that respondents *could* be arrested if they refused to leave. The District Court found that the guards caused respondents to believe that they would be arrested and that this was the reason that they left the Mall. The Court of Appeals affirmed this finding and it is supported by the record.

forms of speech from its property. In other words, we must decide whether ownership of the Center gives petitioner unfettered discretion to determine whether or not it will be used as a public forum.

This Court held in *Marsh* v. *Alabama, supra,* that even though property is privately owned, under some circumstances it may be treated as though it were publicly held, at least for purposes of the First Amendment. In *Marsh,* a member of the Jehovah's Witnesses religious sect was arrested and convicted of violating Alabama's criminal trespass statute when she undertook to distribute religious literature in the downtown shopping area of a privately owned town without permission of the owner. The Court reasoned that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Supra,* at 506. Noting that the stifling effect produced by any ban on free expression in a community's central business district was the same whether the ban was imposed by public or private owners, the Court concluded that

> "When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment 'lies at the foundation of free government by free men' and we must in all cases 'weigh the circumstances and . . . appraise the . . . reasons . . . in support of the regulation . . . of the rights.' . . . In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not suffi-

cient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute." (Footnotes and citations omitted.) *Id.*, at 509.

We relied heavily on *Marsh* in deciding *Logan Valley, supra.* In *Logan Valley*, a shopping center in its formative stages contained a supermarket and department store. The supermarket employed a staff composed of only nonunion employees. Members of Amalgamated Food Employees Union, Local 590, began to picket the market with signs stating that the market's employees were not receiving union wages or union benefits. The picketing was carried out almost entirely in the parcel pickup area and that portion of the parking lot immediately adjacent thereto. 391 U. S., at 311. The supermarket sought and obtained an injunction from a Pennsylvania state court prohibiting the union members from trespassing upon the parking areas or in the store, the effect of which was to prohibit picketing and handbilling on any part of the private property and to relegate the union members to carrying signs on the publicly owned earthern berms that surrounded the shopping center.[2] Finding that the shopping center was the functional equivalent of the business district involved in *Marsh*, we could see "no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally re-

[2] *Logan Valley* involved both picketing and handbilling, since the effect of the state court injunction was to ban both forms of expression. 391 U. S., at 322–323 and n. 12. We made it clear in *Logan Valley* that while there were obvious differences between picketing and handbilling, both involved a modicum of a burden on property. We held that neither could be barred from a shopping center that was the functional equivalent of a public business district. *Ibid.*; *id.*, at 315–316.

quired, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the 'business district' is not under the same ownership." *Id.*, at 319. Thus, we held that the union activity was constitutionally protected.

B. In the instant case the District Court found that "the Mall is the functional equivalent of a public business district" within the meaning of *Marsh* and *Logan Valley*. The Court of Appeals specifically affirmed this finding, and it is overwhelmingly supported by the record.

The Lloyd Center is similar to Logan Valley Plaza in several respects: both are bordered by public roads, and the entrances of both lead directly into the public roads; both contain large parking areas and privately owned walkways leading from store to store; and the general public has unrestricted access to both. The principal differences between the two centers are that the Lloyd Center is larger than Logan Valley, that Lloyd Center contains more commercial facilities, that Lloyd Center contains a range of professional and nonprofessional services that were not found in Logan Valley, and that Lloyd Center is much more intertwined with public streets than Logan Valley. Also, as in *Marsh*, *supra*, Lloyd's private police are given full police power by the city of Portland, even though they are hired, fired, controlled, and paid by the owners of the Center. This was not true in *Logan Valley*.

In 1954, when Lloyd's owners first acquired land for the Center, the city of Portland vacated about eight acres of public streets for their use. The ordinance accomplishing the vacation sets forth the city's view of the Center's function:

"WHEREAS the Council finds that the reason for these vacations is for general building purposes to

> be used in the development of a *general retail business district* and the development of an adequate parking area to support said district; . . . the Council . . . finds that in order to develop a large retail unit such as contemplated by Lloyd Corporation, Ltd., it is necessary to vacate the streets above mentioned . . . ." (Emphasis added.) Ordinance No. 101288, Nov. 10, 1954, App. 202.

The 1954 ordinance also indicates that the city of Portland was aware that as Lloyd Center developed, it would be necessary for the city to build new streets and to take other steps to control the traffic flow that the Center would engender. App. 202, 208–209. In 1958, an emergency ordinance was passed giving the Lloyd Center an extension of time to meet various conditions on which the 1954 vacations were made. The city council viewed the projected Center as offering an "opportunity for much needed employment" and concluded that the emergency ordinance was "necessary for the immediate preservation of the public health, peace and safety of the city of Portland." Ordinance No. 107641, March 20, 1958, App. 196.

In sum, the Lloyd Center is an integral part of the Portland community. From its inception, the city viewed it as a "business district" of the city and depended on it to supply much-needed employment opportunities. To insure the success of the Center, the city carefully integrated it into the pattern of streets already established and planned future development of streets around the Center. It is plain, therefore, that Lloyd Center is the equivalent of a public "business district" within the meaning of *Marsh* and *Logan Valley*. In fact, the Lloyd Center is much more analogous to the company town in *Marsh* than was the Logan Valley Plaza.

Petitioner agrees with our decision in *Logan Valley* that it is proper for courts to treat shopping centers

differently from other privately owned property, like private residences. The Brief for Petitioner states at pages 9–10 that

> "[a] shopping center, which falls somewhere between the extremes of a company town and a private residence, is neither absolutely subject to the control of the owner nor is it absolutely open to all those wishing to engage in speech activities. . . .
>
> "Each case requires an appropriate resolution of the conflicting interests of shopping center owners and those seeking to engage in speech activities on shopping center premises."

Petitioner contends that our decision in *Logan Valley* struck the appropriate balance between First Amendment and private property interests. The argument is made, however, that this case should be distinguished from *Logan Valley*, and this is the argument that the Court accepts.

II

As I have pointed out above, Lloyd Center is even more clearly the equivalent of a public business district than was Logan Valley Plaza. The First Amendment activity in both *Logan Valley* and the instant case was peaceful and nondisruptive; and both cases involve traditionally acceptable modes of speech. Why then should there be a different result here? The Court's answer is that the speech in this case was directed at topics of general interest—the Vietnam war and the draft—whereas the speech in Logan Valley was directed to the activities of a store in the shopping center, and that this factual difference is of constitutional dimensions. I cannot agree.

A. It is true that in *Logan Valley* we explicitly left open the question whether "property rights could, con-

sistently with the First Amendment, justify a bar on picketing [or handbilling] which was not . . . directly related in its purpose to the use to which the shopping center property was being put." 391 U. S., at 320 n. 9. But, I believe that the Court errs in concluding that this issue must be faced in the instant case.

The District Court observed that Lloyd Center invites schools to hold football rallies, presidential candidates to give speeches, and service organizations to hold Veterans Day ceremonies on its premises. The court also observed that the Center permits the Salvation Army, the Volunteers of America, and the American Legion to solicit funds in the Mall. Thus, the court concluded that the Center was already open to First Amendment activities, and that respondents could not constitutionally be excluded from distributing leaflets solely because Lloyd Center was not enamored of the form or substance of their speech. The Court of Appeals affirmed, taking the position that it was not extending either *Logan Valley* or *Marsh*. In other words, the District Court found that Lloyd Center had deliberately chosen to open its private property to a broad range of expression and that having done so it could not constitutionally exclude respondents, and the Court of Appeals affirmed this finding.

Petitioner apparently concedes that if the lower courts are correct, respondents should prevail. Brief for Petitioner 19. This concession is, in fact, mandated by our decision in *Logan Valley*, in which we specifically held that members of the public may exercise their First Amendment rights on the premises of a shopping center that is the functional equivalent of a business district if their activity is "generally consonant with the use to which the property is actually put." 391 U. S., at 320. If the property of Lloyd Center is generally open to First Amendment activity, respondents cannot be excluded.

On Veterans Day, Lloyd Center allows organizations to parade through the Center with flags, drummers, and color guard units and to have a speaker deliver an address on the meaning of Veterans Day and the valor of American soldiers. Presidential candidates have been permitted to speak without restriction on the issues of the day, which presumably include war and peace. The American Legion is annually given permission to sell poppies in the Mall because Lloyd Center believes that "veterans . . . deserves [*sic*] some comfort and support by the people of the United States." [3] In light of these facts, I perceive no basis for depriving respondents of the opportunity to distribute leaflets inviting patrons of the Center to attend a meeting in which different points of view would be expressed from those held by the organizations and persons privileged to use Lloyd Center as a forum for parading their ideas and symbols.

I believe that the lower courts correctly held that respondents' activities were directly related in purpose to the use to which the shopping center was being put. In my view, therefore, this case presents no occasion to consider whether or not *Logan Valley* should be extended. But, the Court takes a different view and concludes that Lloyd Center was never opened to First Amendment activity. Even if I could agree with the Court on this point, I would not reach a different result in this case.

B. If respondents had distributed handbills complaining about one or more stores in Lloyd Center or about

[3] App. 62 (testimony of R. Horn, manager of Lloyd Center). It is widely known that the American Legion is a Veteran's organization. See 1 Encyclopedia of Associations 997 (7th ed. 1972). It is also common knowledge that the poppy is the symbol sold by the Legion to finance various of its activities. At times the proceeds from selling poppies were used to finance lobbying and other activities directed at increasing the military capacity of the United States. R. Jones, A History of the American Legion 330–332 (1946).

the Center itself, petitioner concedes that our decision in *Logan Valley* would insulate that conduct from proscription by the Center.[4] I cannot see any logical reason to treat differently speech that is related to subjects other than the Center and its member stores.

We must remember that it is a balance that we are striking—a balance between the freedom to speak, a freedom that is given a preferred place in our hierarchy of values, and the freedom of a private property owner to control his property. When the competing interests are fairly weighed, the balance can only be struck in favor of speech.

Members of the Portland community are able to see doctors, dentists, lawyers, bankers, travel agents, and persons offering countless other services in Lloyd Center. They can buy almost anything that they want or need there. For many Portland citizens, Lloyd Center will so completely satisfy their wants that they will have no reason to go elsewhere for goods or services. If speech is to reach these people, it must reach them in Lloyd Center. The Center itself recognizes this. For example, in 1964 its director of public relations offered candidates for President and Vice President the use of the center for political speeches, boasting "that our convenient location and setting would provide the largest audience [the candidates] could attract in Oregon." App. 187.

For many persons who do not have easy access to television, radio, the major newspapers, and the other forms of mass media, the only way they can express themselves to a broad range of citizens on issues of general public concern is to picket, or to handbill, or to utilize other

[4] The record indicates that when unions have picketed inside the Mall, Lloyd Center has voiced no objections. App. 108 (testimony of R. Horn, manager of Lloyd Center). It is apparent that petitioner has no difficulty in accepting our decision in *Logan Valley* and in complying with it.

free or relatively inexpensive means of communication. The only hope that these people have to be able to communicate effectively is to be permitted to speak in those areas in which most of their fellow citizens can be found. One such area is the business district of a city or town or its functional equivalent.[5] And this is why respondents have a tremendous need to express themselves within Lloyd Center.

Petitioner's interests, on the other hand, pale in comparison. For example, petitioner urges that respondents' First Amendment activity would disturb the Center's customers. It is undisputed that some patrons will be disturbed by any First Amendment activity that goes on, regardless of its object. But, there is no evidence to

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[5] It is evident from the Court's opinion that the majority fails to grasp the essence of our decision in *Logan Valley*. The Court notes that there is a difference between a free-standing store and one located in a shopping center, and between small stores and extremely large ones, but suggests that because the difference is "of degree—not of principle" it is unimportant. This flies directly in the face of *Logan Valley*, where we said that as private property expands to the point where it becomes, in reality, the business district of a community, the rights of the owners to proscribe speech on the part of those invited to use the property diminish. When the Court states that this was broad language that was somehow unnecessary to our decision, it betrays its misunderstanding of the holding.

As Mr. Justice Black and MR. JUSTICE WHITE both pointed out in dissent in *Logan Valley*, there was really only one issue before the Court—*i. e.*, whether the Logan Valley Plaza was prevented by the Fourteenth Amendment from inhibiting speech even though it was private property. The critical issue was whether the private property had sufficient "public" qualities to warrant a holding that the Fourteenth Amendment reached it. We answered this question in the affirmative, and the answer was the pivotal factor in our decision. Every member of the Court was acutely aware that we were dealing with degrees, not absolutes. But we found that degrees of difference can be of constitutional dimension. While any differences between the instant case and *Logan Valley* are immaterial in my view, such differences as there are make this a clearer case of illegal state action.

indicate that speech directed to topics unrelated to the shopping center would be more likely to impair the motivation of customers to buy than speech directed to the uses to which the Center is put, which petitioner concedes is constitutionally protected under *Logan Valley*. On the contrary, common sense would indicate that speech that is critical of a shopping center or one or more of its stores is more likely to deter consumers from purchasing goods or services than speech on any other subject. Moreover, petitioner acknowledges that respondents have a constitutional right to "leaflet" on any subject on public streets and sidewalks within Lloyd Center. It is difficult for me to understand why leafletting in the Mall would be so much more disturbing to the Center's customers.

I also find patently frivolous petitioner's argument that if handbilling in the Mall is permitted, Lloyd Center would face inordinate difficulties in removing litter from its premises. The District Court found that respondents' activities were litter-free. Assuming, *arguendo*, that if respondents had been permitted to continue their activities, litter might have resulted, I think that it is immediately apparent that even if respondents confined their activites to the public streets and sidewalks of the Center as Lloyd's private police suggested, litter would have been a problem as the recipients of the handbills carried them to the shopping and parking areas. Petitioner concedes that it would have had to remove this litter. There is no evidence that the amount of litter would have substantially increased if respondents distributed the leaflets within the Mall. But, even assuming that the litter might have increased, that is not a sufficient reason for barring First Amendment activity. See, *e. g., Schneider* v. *State*, 308 U. S. 147 (1939). If petitioner is truly concerned about litter, it should accept a previous suggestion by this Court and prosecute those

who throw handbills away, not those who use them for communicative purposes.[6] *Id.*, at 162.

In sum, the balance plainly must be struck in favor of speech.

C. Petitioner's other grounds for denying respondents access to the Mall can be dealt with quickly. The assertion is made that petitioner had the right to regulate the manner in which First Amendment activity took place on its property, and that because the public streets and sidewalks inside the Center offered sufficient access to the public, it was permissible to deny respondents use of the Mall. The District Court found that certain stores in the Center could only be reached by using the private walkways of the Mall. Those persons who drove into the Center, parked in the privately owned parking lots, and who entered the stores accessible only through the Mall could not be safely reached from the public streets and sidewalks. Hence, the District Court properly found that the Mall was the only place where respondents had reasonable access to all of Lloyd Center's patrons.[7] 308 F. Supp., at 131. At one point in this

[6] Since petitioner's security guards have full police power, they can enforce state laws against littering, just as they have enforced laws against loitering in the past. App. 45 (testimony of R. Horn, manager of Lloyd Center).

[7] The Court implies that it is willing to reverse both lower courts and hold that their findings that alternative forums for leafletting in Lloyd Center were either not as effective as the Mall or dangerous are clearly erroneous. I too have read the record in this case and I find no warrant for such a holding. The record plainly shows that it was impossible to reach many of the shoppers in the Center without using the Mall unless respondents were willing to approach cars as they were leaving the center. The District Court and the Court of Appeals took the view that requiring respondents to run from the sidewalk, to knock on car windows, to ask that the windows be rolled down so that a handbill could be distributed, to offer the handbill, run back to the sidewalk, and to repeat this gesture for every automobile leaving Lloyd Center involved hazards not only to

litigation, petitioner also attempted to assert that it was entitled to bar respondents' distribution of leaflets on the ground that the leaflets violated the Selective Service laws. The District Court found that this contention was without merit. 308 F. Supp., at 132–133. It seems that petitioner has abandoned the contention in this Court. In any event, it is meritless for the reasons given by the District Court.

III

In his dissenting opinion in *Logan Valley*, 391 U. S., at 339, MR. JUSTICE WHITE said that the rationale of that case would require affirmance of a case like the instant one. MR. JUSTICE WHITE, at that time, was convinced that our decision in *Logan Valley*, incorrect though he thought it to be, required that all peaceful and nondisruptive speech be permitted on private property that was the functional equivalent of a public business district.

As stated above, I believe that the earlier view of MR. JUSTICE WHITE is the correct one, that there is no legitimate way of following *Logan Valley* and not applying it to this case. But, one may suspect from reading the opinion of the Court that it is *Logan Valley* itself that the Court finds bothersome. The vote in *Logan Valley* was 6–3, and that decision is only four years old. But, I am aware that the composition of this Court has radically changed in four years. The fact remains that *Logan Valley* is binding unless and until it is overruled. There is no valid distinction between that case and this one, and, therefore, the results in both cases should be the same.

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respondents but also to other pedestrians and automobile passengers. Having never seen Lloyd Center, except in photographs contained in the record, and having absolutely no idea of the amount of traffic entering or leaving the Center, the Court cavalierly overturns the careful findings of facts below. This, in my opinion, exceeds even the most expansive view of the proper appellate function of this Court.

While the majority is obviously troubled by the rationale of *Logan Valley*, it is interesting that none of the participants in this litigation have experienced any similar difficulty. Lloyd Center urges that *Logan Valley* was correctly decided, that it struck a balance that the First Amendment required us to strike, and that it has fully complied with *Logan Valley* with respect to labor activity. The American Retail Federation urges in its Brief as *amicus curiae* that a balance must be struck between the property interests of shopping center owners and the First Amendment interests of shopping center users. It does not urge that *Logan Valley* was incorrectly decided in any way.

It is true that Lloyd Center and the American Retail Federation ask the Court to distinguish this case from *Logan Valley*, but what is more important is that they recognize that when massive areas of private property are opened to the public, the First Amendment may come into play. They would like, of course, to limit the impact of speech on their private property, but whether or not they can do so consistently with the First Amendment is a question that this Court must resolve.

We noted in *Logan Valley* that the large-scale movement of this country's population from the cities to the suburbs has been accompanied by the growth of suburban shopping centers. In response to this phenomenon, cities like Portland are providing for large-scale shopping areas within the city. It is obvious that privately owned shopping areas could prove to be greatly advantageous to cities. They are totally self-sufficient, needing no financial support from local government; and if, as here, they truly are the functional equivalent of a public business area, the city reaps the advantages of having such an area without paying for them. Some of the advantages are an increased tax base, a drawing attraction for residents, and a stimulus to further growth.

It would not be surprising in the future to see cities rely more and more on private businesses to perform functions once performed by governmental agencies. The advantage of reduced expenses and an increased tax base cannot be overstated. As governments rely on private enterprise, public property decreases in favor of privately owned property. It becomes harder and harder for citizens to find means to communicate with other citizens. Only the wealthy may find effective communication possible unless we adhere to *Marsh* v. *Alabama* and continue to hold that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it," 326 U. S., at 506.

When there are no effective means of communication, free speech is a mere shibboleth. I believe that the First Amendment requires it to be a reality. Accordingly, I would affirm the decision of the Court of Appeals.

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